

 [R. v. A.S.D., \[2019\] B.C.J. No. 162](#)

British Columbia and Yukon Judgments

British Columbia Supreme Court

Vancouver, British Columbia

T.A. Schultes J.

Heard: January 24-25, April 16-18, July
23-27, 2018; January 11, 2019.

Judgment: February 6, 2019.

Docket: 26829

Registry: Vancouver

[2019] B.C.J. No. 162 | 2019 BCSC 147

Between Regina, and A.S.D., G.C.A.R., and L.Z.

(620 paras.)

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 109(1)(a), s. 236(b), s. 487.051(1)(a), s. 742.1(c), s. 743.21

Youth Criminal Justice Act, s. 3(1)(b)(i), s. 34(7)(b)(ii), s. 38(1), s. 38(2), s. 38(3), s. 42(2)(o), s. 42(2)(q), s. 42(2) (r)(iii), s. 42(7), s. 59(2), s. 64, s. 72(1)(a), s. 72(1) (b), s. 89(1), s. 89(2), s. 94(1), s. 105(2), s. 105(3), s. 110(1), s. 119(1)(g)(i), s. 119(1)(g)(ii)

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Restriction on Publication: An automatic ban is in place pursuant to s. 110(1) of the *Youth Criminal Justice Act*, prohibiting the publication of any information that would identify the young persons who are referred to in this judgment by the initials A.S.D., G.C.A.R. or L.Z. This publication ban applies

indefinitely, unless the information is published by a young person who is protected by this ban or the court has ordered publication.

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T.A. SCHULTES J.

I. INTRODUCTION

1 On January 11, 2019, I imposed sentences on A.S.D., G.C.A.R. and L.Z., with reasons to follow. These are the reasons.

2 On October 10, 2017, I had convicted Mr. D. and Mr. R. of manslaughter and Mr. Z. of second degree murder, all in connection with the stabbing death of Luka Gordic in Whistler in the early morning hours of May 17, 2015. The neutral citation for the reasons for judgment is [2017 BCSC 2487](#).

3 The Crown then applied pursuant to s. 64 of the *Youth Criminal Justice Act*, [S.C. 2002, c. 1](#) [YCJA], to have all three offenders receive adult sentences. The offenders opposed the applications and sought to receive youth sentences under the YCJA.

4 The sentencing hearing was originally planned to take place in two stages - first, the determination of youth vs. adult sentences, followed by a hearing on the length and structure of each sentence. After I advised the Crown and defence that I would find the submissions on the actual sentences being sought helpful on an aspect of the adult vs. youth question that related to Mr. D. and Mr. R., the process was collapsed into a single hearing, with one judgment to deal with both issues. It appears from my review of other cases that this is the most common way of addressing these issues.

5 The sentencing process was approached by the Crown and defence with the same thoroughness that characterized their conduct of the trial. Although I have considered all of the material and submissions that have been provided, including the lengthy reports prepared for each offender, I will be focusing in these reasons on the information that I found the most relevant and helpful.

II. CIRCUMSTANCES OF THE OFFENCES

6 The setting was the May long weekend of 2015. Mr. Gordic was killed shortly after 12:30 on the Sunday morning.

7 As part of an annual tradition, a large number of soon-to-graduate Burnaby high school students and some former students gathered that weekend in Whistler to party. The offenders and most of the non-police witnesses were young people who were in Whistler for that purpose. Consumption of alcohol and drugs by many of those involved was an important part of the circumstances.

8 The three offenders had travelled up to Whistler on Friday afternoon with their mutual friend Arvin Golic, who was 18 at the time and as a result was dealt with as an adult for prosecution and sentencing purposes. He was the catalyst for the tragic events that were to follow.

9 Friendship with Mr. Golic was also the link between the offenders. Mr. R., who attended school in Vancouver, had not met Mr. D. and Mr. Z. before that trip.

10 Mr. Golic's mother drove them up. Mr. Z.'s mother and sister were also passengers in their vehicle. The two parents purchased alcohol for their sons en route. They did not remain in Whistler after dropping the four young men off there.

11 The offenders stayed in a townhouse that had been rented for the weekend, along with numerous other young men.

12 On Saturday Mr. Gordic, who was also in Whistler for this event, had a chance encounter with an associate of Mr. Golic's. During the encounter he asked the friend to tell Mr. Golic to stop harassing Mr. Golic's former girlfriend. This request was then passed on to Mr. Golic, who became enraged and attempted to contact Mr. Gordic by phone, through a mutual friend. They eventually agreed to meet at the Olympic Rings site in the Whistler village, presumably for some type of confrontation, but when Mr. Gordic and his friends went there, Mr. Golic did not appear. Mr. Golic seems to have gone there some time later, because he followed up with more calls, alleging that Mr. Gordic had failed to show and was thereby acting in a cowardly manner. After an exchange between them on the phone, during which Mr. Gordic stressed that everyone was there to have a good time and that in any event he was much bigger than Mr. Golic and would prevail in a fight between them, he stopped taking any more of Mr. Golic's calls.

13 Mr. Golic did not consider the matter closed however. Shortly before midnight, he and a group of young men who had gathered at the townhouse travelled through the Whistler village area in search of Mr. Gordic.

14 Mr. D.'s evidence, which I rejected, was that he accompanied this group of young men in order to find a place to buy cigarettes. Mr. R., whose evidence on this point I also rejected, said he accompanied them to travel to a party. Mr. Z., who testified to drinking alcohol and abusing the prescription medication Xanax that night, had no memory of leaving the townhouse but did not dispute that he had done so.

15 Although they denied any knowledge of its purpose, even on Mr. D. and Mr. R.'s evidence they travelled to and then around the village as part of the overall group.

16 Before the group left the townhouse, Mr. D. and Mr. Z. had been socializing (and then engaging in sexual activity) with two young women who visited them there. We know from Mr. D.'s Facebook messages and text messages to one of these young women, with whom he had agreed to meet again later, that the group must have left the townhouse between 11:42 p.m. on the 16th and 12:07 a.m. on the 17th.

17 I found that this group then travelled to two different areas of the Whistler village. They were seen by a witness near a restaurant in Village Centre and also encountered three friends of Mr. Gordic's near the Olympic Rings site. The site is in Village North, near the entrance to Marketplace, the shopping complex where Mr. Gordic was later killed.

18 I found that during this encounter Mr. D. had asked these friends of Mr. Gordic's where Mr. Gordic and another one of their friends were. These friends also recognized Mr. Golic as being part of the group that was looking for Mr. Gordic. When one of the friends said, "What the fuck is it to you?" in response to the inquiries about Mr. Gordic, Mr. Golic became angry. A confrontation was averted by the calming efforts of one of the friends and the group containing Mr. D. and Mr. Golic then continued on its way.

19 The fatal attack took place in a walkway between two of the buildings that make up the Marketplace

complex. Mr. Gordic was socializing with other young people, including some of his good friends, in an area close to the northern entrance of the walkway, adjacent to the Marketplace's parking lot.

20 The events that followed were described by the other young people who were present with Mr. Gordic. In addition, the approach of members of the attacking group and the departure of three of them were captured on security video in a restaurant that is next to the southern entrance to the walkway. This video provides useful baseline information about the attack (including the number of participants in it, when it began and its approximate duration), but the picture quality makes it useful only as circumstantial evidence of identification. In Mr. Z.'s case this is in conjunction with the recognition of him by some of Mr. Gordic's companions at the time of the attack, including by Mr. Z.'s former girlfriend.

21 Before the point that the attackers can be seen in the video, one of Mr. Gordic's companions observed a group of 8-12 people in the area of the liquor store in the Marketplace complex, north of the walkway, beginning to approach them. When this group was 30-40 feet away from Mr. Gordic, its members began to "speed walk" and then broke into a run.

22 The video shows that beginning at 12:32:02 a.m., the first of the participants, whom I was satisfied was Mr. Z., appeared from the right side of the screen (which is the northern, or parking lot entrance to the walkway) and began to walk briskly towards Mr. Gordic, who dropped the bag of chips he was eating and began to back up. The second participant, who in the Crown's theory was Mr. Golic¹, entered, caught up to and passed Mr. Z. in pursuit of Mr. Gordic, who backed up to the left and out of the frame.

23 Before Mr. Z. was passed by Mr. Golic, he turned his body from the profile view that the camera originally had of him, to face more directly towards it. At that point he crooked his right arm outwards from his body, with his hand at his waist. One of the witnesses described him as flashing something made out of silver metal at his waistband. He then followed the second attacker who had passed him, in pursuit of Mr. Gordic.

24 A total of nine potential attackers eventually crossed the screen from right to left, in the direction that Mr. Gordic had fled.

25 Despite their varying levels of sobriety, I accepted the evidence of some of Mr. Gordic's companions about the events of the actual attack.

26 In its initial stages one of the attackers, likely Mr. Golic, said words to the effect of, "There you are, you little bitch" and "You didn't think you'd see me here".

27 As to the attack itself, the most reliable witnesses described, variously, "about eight to 10 guys" in a circle punching Mr. Gordic, and a group of "seven or more" "swarming" him. A witness who had known Mr. Golic for several years described him as punching Mr. Gordic "the most." All of the witnesses described the attacking group throwing punches to some extent. I was satisfied that every one of the nine who had pursued Mr. Gordic to that point participated in the attack.

28 I accepted the evidence of a witness who said he saw the person I ultimately found was Mr. Z. stick a knife in the left side of Mr. Gordic's body, under his armpit. I also found that Mr. Z. said "I juked him" a slang term for stabbing, which was heard by several witnesses.

29 Mr. Gordic returned into view of the video from the left, standing briefly in the area of his friends before staggering and then collapsing to the ground.

30 He was taken to hospital but died of his injuries later that morning. He had suffered three stab wounds, all to the left side of his body. The cause of death was the wound to the lower left chest wall area, which damaged one of the chambers of his heart and caused blood to flow into the surrounding areas. The other wounds were a shallower one to the mid-left front of his chest and a deeper one to his left armpit (which the witness had described being inflicted), which damaged a large calibre vein in that area. That latter wound could have eventually proved fatal on its own.

31 The video shows that three members of the attacking group returned into the camera's view and fled back in the direction from which they had come (north), leading to the inference that the six other attackers fled south, towards Main Street.

32 In keeping with this inference, I found that Mr. D., Mr. R. and Mr. Z. were the three young males depicted in a security video at a 7-Eleven about 50 metres west of Main Street to the walkway, jogging in a westerly direction, between 12:37:36 and 12:37:46.

33 In their evidence, Mr. D. and Mr. R. denied participating in the attack, which they said was launched by unknown individuals ahead of them, and from which they fled once they realized what was happening. Mr. D. sought to identify himself as a group member who was shown in the video retreating from the walkway without ever having entered the area where the attack was taking place. Mr. R. sought to link himself with a member of the attacking group who appeared to be looking downwards as he approached the attack area, in support of his claim to have been focused on text messaging with his girlfriend at that point. As I have mentioned, Mr. Z. testified that he had no memory of these events because of his intoxication.

34 The three offenders were arrested a few minutes later in an area south of the attack scene.

35 Mr. D. and Mr. Z. were walking west together on the northern sidewalk of Village Gate Boulevard. Mr. R. was walking behind them when they were first seen by the police but then veered to the right, possibly at a spot where the sidewalk branches off. He was arrested shortly afterwards farther west on Village Gate Boulevard, walking in the same direction as the other two had been, after he hailed two bicycle patrol officers and asked them for directions to the townhouse complex he was staying at.

36 Evidence was found on them (and in the case of Mr. R. also back at the attack scene) that linked them to the attack through forensic analysis.

37 The heel of Mr. D.'s left boot and the toe of his right boot contained bodily substances, which I was satisfied was blood, the DNA profile of which matched a known sample from Mr. Gordic to a very high degree of probability. In the case of the sample on the toe of the boot, it was a mixed profile to which Mr. D. was the main contributor. The bloodstain pattern expert described these as transfer stains, consistent with a person or object contaminated by blood coming into contact with the boot.

38 The "outstep" area of Mr. R.'s right shoe, near the laces, also contained a sample that tested positive for blood on the more discriminating of the presumptive tests used by the RCMP Forensic Laboratory. The profile of that sample also matched a known sample from Mr. Gordic to a high degree of probability. This was described as an "altered spatter stain", caused by blood being dispersed through the air due to an external force being applied to liquid blood, and then an alteration occurring by an object wiping through it, or it being diluted by water or another liquid.

39 These samples taken from specific stains were in addition to other similar-looking stains found on the footwear that were not tested for DNA, in particular a transfer stain on the toe of Mr. R.'s shoe.

40 In addition, the major contributor to a mixed DNA profile on the blade of a folding knife that was found opened at the attack scene matched, to a high degree of probability, the profile of a known sample from Mr. R. There is no suggestion that this knife was ever used in the attack however. At the time of his arrest Mr. R. had a small fresh cut on his left index finger, just below the nail. I rejected his explanation that it had resulted from his habit of picking the skin on his fingers below the nails.

41 Mr. Z.'s physical involvement in the attack was not in issue, but it is worth mentioning that the major contributor to mixed profiles found in three samples from his jacket matched Mr. Gordic, as did the profiles of samples obtained from various locations on the knife in his pocket. The bloodstain pattern expert also identified multiple spatter and transfers stains on his jacket.

42 Despite the thorough exploration by Mr. D.'s and Mr. R.'s counsel of alternative explanations for the deposit of DNA in these locations, I rejected the possibility of any innocent transfer having occurred. For the footwear, the alternatives were improper exhibit handling procedures by the police or the offenders moving through the blood-stained attack scene. For the knife, the alternatives were Mr. R. having handled it with the rest of the group back at the condo, or by the transfer of his DNA, through handshaking or other physical contact, to the person who actually actual wielded the knife at the time of the attack, who in turn transferred Mr. R.'s DNA to the blade.

43 In relation to Mr. D. and Mr. R., I made the following specific findings:

[771] I have found no other possible way for Mr. Gordic's blood to have ended up on their footwear than from close proximity to Mr. Gordic while he was bleeding at the attack. I accept the evidence of the witnesses who described this as a group assault involving all of the attackers who entered that area, coming together closely around Mr. Gordic, attacking him before dispersing in two directions.

[772] I am satisfied that the transfer stains on A.D.'s boots indicate that he brought his feet into contact with Mr. Gordic's body or clothing while they had blood on them, most likely by kicking him. I find that the transfer stains on G.R.'s shoe reflects the same origin and physical action, and the drip stains reflect close proximity to Mr. Gordic while he was bleeding during the group assault.

[773] I also find that A.D. was actively involved in the search for Mr. Gordic by more than just his presence in the group, by questioning [Mr. Gordic's three friends] about his location. This is further evidence capable of attaching him to the group's purpose of attacking Mr. Gordic when they found him, and tends to suggest that he was physically part of that effort when Mr. Gordic was found.

[774] In the absence of any credible evidence of a basis for secondary transfer of G.R.'s DNA as the major profile on the blade of the knife, I conclude that it was placed there by direct transfer from his hand. If, aside from the evidence of passing the knife around in the context of frequent hand-to-hand contact by the townhouse occupants that I have rejected, there is still some residual possibility of secondary transfer, I would reject it as the mechanism here in light of the great unlikelihood of it then forming the major profile, as explained by [the DNA reporting officer]. Its presence on the blade of a knife that I find was left open at the scene of the group attack is a further piece of evidence tending to confirm both his presence at the attack and his performance of

some operation of the knife consistent with its overall intent. I stress that Crown did not argue and I would not find that the knife was used to actually stab Mr. Gordic.

[775] His unexplained (in light of my rejection of the skin picking cause), and still bleeding cut, which indicates a recent interaction with an object sharper than the edge of piece of paper, according to [the officer who transported him from the arrest scene], is a further small piece of evidence capable of showing some manual interaction with the knife blade in the recent past and deserves to be weighed on that basis. (I should say that the alternate explanation of some interaction with his handcuffs in the back of the police car, which was proposed by his counsel as a matter of judicial notice in his final reply submissions, did not strike me as realistic.)

44 I also gave some weight to their flight from the scene as post-offence conduct, tending to show their awareness of their own culpability in the attack that had occurred.

45 In light of my rejection of his evidence of his consumption pattern and his inability to remember the events surrounding the attack, Mr. Z.'s defence of intoxication did not succeed. While I was satisfied that he had likely consumed alcohol and possibly Xanax, on all the evidence (in particular his post-offence focus and lucidity in his dealings with the police, despite some disinhibition and loss of emotional regulation) I was not left with any reasonable doubt that the inference that he understood the consequences of his actions had been displaced.

46 On the questions of causation and of his possession of one of the required intents for second degree murder, I first found, based on the evidence that I had accepted from the scene witness, that Mr. Z. had certainly inflicted the stab wound under Mr. Gordic's left arm.

47 I then rejected the possibility that there had been an additional stabber, because there was no admissible evidence of such actions by any of the other participants. The defence had pursued this possibility based on (1) the presence of what appears to be a knife in the hands of one of the attackers in the scene video; (2) information provided to the investigators by witnesses about the possibility of a second stabber; and (3) the failure by the investigators to preserve a portion of Mr. Gordic's rib from the autopsy, the analysis of which might have been able to show that the type of blade used to stab him was different from the knife found on Mr. Z.

48 Following this conclusion, I said:

[781] While the absence of evidence of another stabber would in itself permit me to find that L.Z. was in fact the only one, the Crown has gone further and identified other bases to support such a conclusion. Those I find helpful are:

- * The relatively close proximity of the wounds and their location on the same side of the body, tending to render it unlikely that different stabbers inflicted them;
- * The nature of the attack as a group assault or swarming in which all the attackers gathered closely around Mr. Gordic and assaulted him, as I have found. In the course of a maximum of 17 seconds, it would have been particularly difficult for more than one stabber to get into the necessary position relative to the first one to inflict the other wounds in this area and side of the body.
- * The significant amount of blood spatter and transfer stains on L.Z.'s right side, suggesting his close proximity and physical contact with Mr. Gordic's left side and the resulting blood during the stabbing, which seems unlikely to have resulted from the armpit stab alone.

[782] While these additional considerations fortify the conclusion that inevitably results from the absence of other admissible evidence, I would have, on the basis of that absence alone, concluded L.Z. was the sole stabber.

...

[784] On all the evidence, I conclude that when L.Z. inflicted these wounds, he was causing bodily harm that he knew was likely to cause death and was reckless whether death ensued or not. His consumption of substances may well have made him less inhibited about acting on whatever impulse motivated this action, and he need not have held this intention for long at all before acting on it, but I am satisfied beyond a reasonable doubt that this was indeed his present intent when he acted.

[785] In considering all of this evidence, I have satisfied myself that [another] alternative route to an acquittal on second degree murder [proposed by Mr. Z.'s counsel], that he struck these more vital areas in the course of the melee in which Mr. Gordic changed his position to evade harm, without intending to bestow the blows there, is not plausible.

[786] Having found that L.Z. was the sole stabber, I do not think it is a reasonable possibility that he could have continued to stab in this part of the body without having developed the intention to strike there, with the level of bodily harm and the likelihood of death ensuing that such blows would inevitably have entailed.

49 Thus, I concluded that the only reasonable inference from the evidence was that Mr. D. and Mr. R. participated in a joint assault on Mr. Gordic from which the possibility of non-trivial bodily harm was objectively foreseeable, and that Mr. Z. caused Mr. Gordic's death with the intent described in s. 229(a)(ii) of the *Criminal Code*. This resulted in the findings of guilt that I have described.

III. VICTIM IMPACT

50 Many of Mr. Gordic's family members and friends submitted victim impact statements. Some of them were read in court by their authors.

51 Each in its own way, these statements compellingly express the very severe emotional effects of Mr. Gordic's murder on those who were close to him. As they explain, those left behind are struggling to cope with the loss, through a senseless act of violence, of a person who was such an essential part of their lives and who had so much of his own young life still to live.

52 It is clear that the harm caused by this offence has been extremely serious.

IV. CIRCUMSTANCES OF THE OFFENDERS

A. Overview

53 The backgrounds of the offenders were described very helpfully in a series of reports that were prepared for the court - pre-sentence, psychosocial history, psychology and psychiatry. The pre-sentence and psychosocial reports provide narratives of the offenders' backgrounds and current circumstances. Opinions on the causes of their offending, evaluation of their risk of reoffending and the specific rehabilitative recommendations are found in the psychological and psychiatric reports.

54 For Mr. Z. there was also a report that addressed his suitability for an intensive rehabilitative custody and supervision ("IRCS") order pursuant to s. 42(7) of the *YCJA* (the requirements of which I will

explain) and a psychological report obtained by his counsel from Dr. Ley, an experienced forensic psychologist.

55 When these reports are combined with the submissions of their counsel and the reference letters that their family members and friends provided on their behalf, comprehensive profiles of the offenders and their circumstances emerge.

56 The psychologists and psychiatrists who prepared the court-ordered reports did not initially have my reasons for judgment, which had not been released yet, to refer to when they submitted the reports. After reviewing the reasons, they all confirmed that their opinions would not change. Dr. Ley had the reasons when he prepared his report.

B. A.S.D.

1. Personal background

a. Age

57 He is now 21 years old. The offence was committed about two and a half months before his eighteenth birthday.

b. Family

58 He lived then and was continuing to live as of the time of the reports with his parents and younger siblings. He has close relationships with them and they remain very supportive of him. His family was described in one report as being "extremely close-knit".

59 The reports also indicate that he had a happy, positive childhood. His discipline problems at home in the period leading up to the offence were described as not being out of the ordinary for a teenager - essentially testing the parental limits that were being placed on him for previous misbehaviour. As a potential indication of his level of independence, he had not been away from home without his family before the weekend of this offence.

c. Education

60 He had no difficulties with schooling until Grade 11, when his attendance dropped off and he began to fail classes due to these absences. In his interview with Dr. Steiger, the author of the psychological report, he attributed this problem to his lack of interest in courses that did not relate to his career plans, and to his adolescent focus on having fun and hanging out with friends.

61 One of the school officials interviewed for the pre-sentence report described him as living a "dual life" in this period, of "wanting to be known and feared but also to be seen as doing well". This official said he had numerous talks with Mr. D. about negative interactions with other students. However, the school counsellor who was interviewed for the psychosocial history report said that there were no concerns about Mr. D.'s behaviour other than his non-attendance - only unconfirmed rumours that he was associating with negative peers.

62 It was not considered safe for him to be at school after this offence occurred, so he completed his Grade 12 requirements online.

63 He has completed one semester of a business administration program at college since graduating. He

stopped due to the time requirements of attending the trial.

d. Criminal History and response to supervision

64 He has no previous criminal record. He spent nine days in custody in this matter before being released.

65 He has complied with all of the terms of his release, including frequent ongoing curfew checks. Although his youth probation officer, Ms. Davison, described him to the authors of the psychological and psychiatric reports as having "quite the ego", she also stressed that he was respectful, cooperative and compliant in his dealings with her.

e. Substance Use

66 His history consists of regular alcohol use at parties (as well as an admission to Dr. Steiger that he had been drunk enough to become physically ill "on many occasions"), ongoing marihuana use and minor experimentation with other drugs. He currently drinks socially - only occasionally and in smaller amounts - and told Ms. Davison that he smokes marihuana nightly as a means of overcoming insomnia. (He told Dr. Steiger that his use of it varied from once or twice a month to four or five times per week). Before marihuana use was legalized, he had a card permitting him to obtain it for medical purposes.

f. Employment

67 He has worked at various jobs since the offence - customer service in a building supply store and serving positions in restaurants - and was employed as a porter at a pub restaurant at the time that the reports were being prepared. He is also involved in day-trading stocks from home, as part of his interest in business.

g. Current activities and attitudes

68 He maintains essentially the same exculpatory version of events that he testified to during the trial, including denying having been involved in searching for Mr. Gordic before the attack.

69 He added the exculpatory detail in the pre-sentence report that because he had not tied his bootlaces, his boot would have flown off if he had actually tried to kick Mr. Gordic (which I had inferred in my reasons for judgment was the likely mechanism of blood being deposited on them). He added to his account of the events to Dr. Steiger that someone in the group had referred to having "spotted Luka" before the group members started running towards Mr. Gordic, and he started to follow. He had not acknowledged any advance reference to Mr. Gordic by members of the group in his trial evidence, instead testifying that he had first recognized Mr. Gordic when Mr. Gordic was already being attacked.

70 His position is that he has been wrongfully convicted and he intends to appeal.

71 As he had in his evidence at trial, he described himself to the report writers as having been intoxicated at the time of the offence.

72 Despite this overall position on his guilt, Mr. D. expressed sadness for "the outcome" of this matter, which I took to mean Mr. Gordic's death, and empathy for Mr. Gordic's family. He prepared and read what I would describe as quite a thoughtful and seemingly sincere letter expressing his regrets to the Gordic family and his recognition that if he "[h]ad ... been sober, this tragedy may not have occurred."

73 He believes he has grown as a person as a result of the effects of the case on him, including the restrictions imposed by his bail conditions.

74 It is common ground that he did not know Mr. R. before that weekend. He has conceded at least a previous association with Mr. Z. According to the pre-sentence report, he told Ms. Davison that two of his "co-accused", whom I take to be Mr. Z. and Mr. Golic, were among his closest friends at the time of the offence. However, he told Dr. Steiger that they were not part of his "core group" of friends. Regardless of the exact extent of his relationships with them, Mr. D. acknowledged that these co-accused were "not the best people". Pursuant to his bail conditions, he has not had further contact with them, other than being in the courtroom with Mr. Z. of course.

75 Perhaps as an indication that his parents were not fully aware of his associations before the offence, his mother told the writer of the psychosocial history report that Mr. D. and Mr. Golic were only "acquaintances" and that she had not heard of his other co-accused. However, in her letter to the court on her son's behalf in the sentencing hearing, she describes her concerns about his friendship with Mr. Golic and her belief that he was afraid of Mr. Golic, because he was older, out of school already and had a dominant personality.

76 Mr. D. has a current smaller group of trusted friends who are not involved with the justice system.

77 His counsel submitted an extensive number of reference letters, many from family members but also from friends, community members and a former employer. All refer in one way or another to his positive character and personal qualities. A particular area of strength that was described was his participation in his local youth soccer club, both as a coach and referee. According to the reference letters and interviews for the reports, he has earned a great deal of appreciation for his work from other participants in that organization, particularly for his work coaching younger children.

78 He attends services regularly and volunteers at a local Sikh temple. Although he says that religion is not a particularly significant aspect of his life, attendance at the temple is "firmly rooted" as a family activity, according to one of the reports.

79 He described having been the victim of fairly serious threats and harassment by people who are connected in some way to Mr. Gordic. This has occurred both in the community and at the courthouse during the trial. The community issues have included being confronted by groups of young men, the circulation of posters identifying him by name (contrary to the *YCJA* publication ban) as having been involved in the offence; acts of vandalism to his family home and vehicles; and reports that reached him that contracts had been taken out on his life. He has also been threatened with serious harm, directly and through his family members, and verbally abused by members of Mr. Gordic's family. He had to resign from the soccer club because of complaints arising from these charges and one can infer from the circumstances surrounding his sudden dismissal from the part-time job that he had at the time of the offence that it was due to his having been charged.

2. Psychological and Psychiatric Assessments and Recommendations

80 Testing carried out for the reports reveals that Mr. D.'s intellectual abilities overall are in the average to low average range, with a quite a lot of variation in his strengths and weaknesses in various areas of his functioning. He does not have an intellectual disability however.

81 No acute psychiatric conditions emerged from the testing either. There were some indications that he attempted to present himself in an overly positive light, but it was not clear whether this was due to a problem acknowledging his personal limitations, or was impression management or defensiveness specifically in response to the assessments.

82 On the question of his maturity at the time of the offence, there were some concerns in his interviews about Mr. D. displaying a degree of grandiosity and preoccupation with acquiring material wealth. But there was no indication, in Dr. Steiger's view, of "intellectual or social-emotional factors" that would have significantly limited his judgment or insight at seventeen, beyond those normally present in adolescence. Dr. Singh, the author of the psychiatric report, also noted that some of Mr. D.'s goals are inflated and unrealistic, although he said that may be a function of his lack of "real world" experience and some narcissistic personality traits.

83 Dr. Steiger found that in fact there was considerable evidence that Mr. D. was functioning at an average to above average level of social maturity for an adolescent his age. However he did not seem aware of the less mature quality of his presentation during the interviews, when he was describing these somewhat grandiose and unrealistic future plans. Dr. Singh made the same observation about Mr. D.'s degree of social maturity, but noted that emotionally he "comes across as immature".

84 The risk assessment tools yielded a finding that his future risk, for both violent and non-violent offending, is low. Dr. Steiger offered the opinion that the offence appears to be an isolated one "likely related less to characterological traits and more to situational and developmental factors present at the time, such as [his] association with relatively more antisocial and violent peers and his failure to fully appreciate the consequences of his choices." Dr. Singh noted the contributing factors of intoxication, as well as association with antisocial peers at the time of the offence and said that "[h]is chance of re-offending remains low as long as he continues to work, attend school and is hopeful about the future."

85 According to Dr. Steiger, the path to future violence for Mr. D., if it occurred, would involve poor adjustment to the community, a return to substance use and association with antisocial or violent peers. Dr. Singh echoed this view, stating that "If [Mr. D.] continues to use substances heavily and associate with peers who have anti-social values, he is likely to offend again." These risks can be mitigated by active participation in counselling, especially if he serves time in custody and has to return to the community. Dr. Singh thought that counselling is needed to address Mr. D.'s grandiose sense of self and his vulnerability to substance abuse, which impaired his judgment in the current situation.

86 Noting that because of his age Mr. D. would serve any custodial sentence in an adult facility, Dr. Steiger sounded the warning that "...an adult custodial sentence would place him at risk for association with and exploitation by antisocial adults, a primary risk factor for recidivism..."

C. G.C.A.R.

1. Personal Background

a. Age

87 Mr. R. was 17 years and one month old when this offence was committed and is now 20.

b. Family

88 At the time of the offence, he was living with his parents and his younger sister in Vancouver. As was

the case for Mr. D., Mr. R.'s family is very close and supportive of him. A further similarity is that he had also not been away from home without his parents until the weekend at Whistler.

89 He described a happy, stable upbringing.

c. Education

90 The reports of his schooling indicate positive results until Grade 10, when he began missing classes. His counsellor advised the writer of the psychosocial history report that Mr. R.'s involvement with a negative peer group was a big part of the change. His parents expressed concerns about him staying out late. He told Dr. Stevenson, the author of the psychiatric report, that he would often arrive at school late because he had stayed up late talking to friends and then slept in.

91 He was then involved in an altercation outside the school grounds in which he was assaulted by other youths who were carrying weapons. The altercation was believed to involve factions of local youth gangs. His version is that he had been threatened by an older youth because of the allegation that he had vandalized that youth's home, and then merely defended himself by grabbing the stick that he had initially been struck with. Regardless, school officials concluded that it was not safe for him to remain there and he was encouraged by his counsellor to transfer to a school in another area of Vancouver.

92 This was not a successful move for him. Although he remained pleasant and polite in his interactions with staff members, he continued to miss a large number classes and was not able to connect with his fellow students.

93 After he was charged with this offence he was not allowed to remain at that new school. The school liaison officer expressed concern at that point that Mr. R. was closely connected to a number of teens who were involved in the drug trade and resulting violence in the South Slope area of Vancouver. He completed all of his graduation requirements, except for one math course which remained outstanding at the time of the reports, at an alternative program.

d. Criminal history and response to supervision

94 He has no criminal history. He spent four days in pre-trial custody before being released. The presentence report describes his compliance with his release conditions, which had included more than 100 curfew checks at the time it was written, as "excellent."

e. Substance Use

95 Despite his intoxication on the night of the offence, his substance use does not emerge as a concern in the reports. He began drinking alcohol at parties, sometimes to the point of getting drunk, and smoking marihuana, when he was in his mid-teens. His only other drug use was the one ecstasy pill that he took in the hours leading up to the offence, as he described in his trial evidence. He now abstains completely from marihuana use and occasionally drinks "one or two beers".

f. Employment

96 His employment history has included picking berries, framing houses, dishwashing in a restaurant and, after being charged, working in a tire store - a job arranged through a youth employment program. He was a great success in that last job, earning a promotion and increased hours, as well as high praise as "a really

great kid" from the director of the program. A subsequent job in sales was not as fulfilling or enjoyable and did not last.

97 At the time of the reports, he was focusing on spending time with family and completing his education. He is very involved in maintaining his physical fitness and part of the material provided by his counsel during the sentencing was confirmation of his registration in a home study course to become a personal trainer.

g. Current activities and attitudes

98 He has been in a relationship with his girlfriend for four years. She testified on his behalf at trial to confirm certain aspects of his evidence. He has a close relationship with her family as well. Because of his 8:00 p.m. curfew on bail, he spends most of his time with her rather than in other kinds of socializing.

99 Earlier in the case he asked his bail supervisor to refer him to a counsellor to help him with the anxiety he was experiencing because of these charges. They met for a few months but no psychiatric involvement or medication was needed. The counsellor described his anxiety as a natural response to his situation - that is, the charge against him.

100 He describes faith as being important to him. Although his family are not Sikhs, they speak Punjabi and so attend services at a Sikh temple, in which he regularly participates.

101 Like Mr. D., Mr. R. maintains the exculpatory version of events that he described in his trial evidence, including his denial of bringing a knife to the attack scene. Nevertheless, he told Mr. Truscott, the author of the pre-sentence report, that he "accepts the verdict".

102 He admits having been extremely intoxicated that night and expresses regret for his failure to be "more intuitive", I infer about Mr. Golic's intentions towards Mr. Gordic. He stressed to Dr. Stevenson that he knew Mr. Golic "as an acquaintance, not a friend." Like Mr. D., he had only driven up with Mr. Golic and Mr. Z. because his original transportation arrangements fell through.

103 He told Mr. Truscott that he thinks about Mr. Gordic daily and he prepared an articulate letter to the Gordic family expressing what appears to be sincere remorse, noting that he has "had no peace" since that night and that he will live with the shame and guilt for the rest of his life. He describes himself as "someone who made a mistake" but that "there is no excuse for it." He has resolved, according to his discussions with Dr. Gangopadhyay, "to do whatever it takes to get [his] life together". Dr. Stevenson also observed that his expressions of "remorse, regret and empathy" for the victim's family during his interview appear to be genuine.

104 Letters for support were provided by Mr. R.'s family members, his girlfriend and her parents, and various family friends. They speak to his essentially kind and caring nature and the inconsistency of the circumstances of the offence with the person they have come to know. Although some of the letters are formatted identically and contain a stock phrase, with minor variations, that he is "well behaved and respectful to family and society", I am satisfied that they nonetheless reflect the individual sentiments of those to whom they are attributed.

105 Mr. R. expressed concern about the effect on his parents' finances of having to pay for legal counsel for him. Dr. Stevenson characterized this as an indication of maturity.

106 Also like Mr. D., he has been the subject of vandalism and threats since being charged with this

offence. This has included windows of his family's vehicles and house being broken; threatening phone calls being made to their house and harassing text messages being sent to him, which required him to change his phone number repeatedly. Before the most recent threat, the Vancouver Police ("VPD") had already suggested more than once that his family should move for their safety. Members of Mr. Gordic's family have lashed out at him verbally at court as well.

107 During the period when the reports were being prepared, the VPD issued a formal warning to him and his family about a credible threat to his safety, which caused him and his mother to relocate on an urgent basis to an apartment in another area. While the VPD would not disclose the specific nature of the threat to Mr. Truscott when he was inquiring about it for the pre-sentence report, a police official advised him that it was not related to this offence.

2. Psychological and Psychiatric Assessments and Recommendations

108 Testing revealed Mr. R. to be in the average range of intelligence and academic ability.

109 His personality profile, as revealed in one of the tests, is consistent with social anxiety, insecurity and dependence on social relationships, as well as "a tendency to submit to the wishes of more assertive peers". Similar youth have a strong need for acceptance by others.

110 He has no symptoms of a serious psychiatric disturbance and his feelings of anxiety and sadness are not viewed as being excessive, given his current situation.

111 With respect to future risk, Dr. Gangopadhyay, the author of the psychological report, found that his most substantial risk is related to peer delinquency (based on his previous association with negative influences), although as of the time the reports were prepared he had cut this contact off and was associating with fewer other youths in general. There was some concern about his stress level and coping mechanisms, although she felt that he was coping adequately.

112 Fortunately, he was also found to have numerous "protective" (that is, risk-reducing) factors, in particular his strong social connections, positive attitude to interventions, keen interest in returning to school and excellent employment record.

113 Overall his level of risk of violent offending was found to be low on both of the risk assessment tools that were applied to him by Dr. Gangopadhyay.

114 Key contributing factors to Mr. R.'s involvement in this offence, in her view, were his substance use, his impulsivity, and the mob mentality and diffusion of individual responsibility that often occurs in group actions like the assault on Mr. Gordic.

115 She had some helpful comments on the level of maturity revealed by the offence. She pointed out that swarming is inherently an immature act, more typical of groups of youths than adults and that "[i]t could be argued that in participating in such a youthful crime, [Mr. R.] was displaying the diminished culpability assumed of young people". She referred to research showing that the area of the brain that assists in thinking before acting is still changing and maturing during adolescence and early adulthood.

116 On the other hand, to the extent that his current situation is relevant to his maturity at the time of the offence, she referred to the absence of any cognitive limitations; his employment since the age of 16, with

an indication of leadership abilities in his job at the tire business; and positive comments from numerous sources who were interviewed for the reports about his maturity.

117 Dr. Stevenson reached the same conclusion on risk. His evaluation led to the opinion that the offence was not characteristic of Mr. R.'s normal behaviour but rather had resulted from a number of regrettable decisions, in particular to associate with a group of "relatively more antisocial youth" and to become significantly intoxicated. He describes him as "a largely prosocial individual who was caught up in a tragic series of events that do not reflect his basic character" and that his connection with antisocial youth was part of a "naïve wish to be part of an edgier, more exciting group" rather than of a specific attraction to delinquency or violence.

118 On the question of treatment, Dr. Gangopadhyay expressed the opinion that Mr. R.'s needs are limited and can be met in an adult or youth setting. A concern she expressed is that in the event that he is sentenced to incarceration he could be negatively influenced or victimized if he is placed in a facility with more serious offenders. Further, the low risk he currently presents could be jeopardized if he had to affiliate with negative peers for his safety in a prison. A lower level of security was therefore recommended for any incarceration.

119 Significantly, she expressed the opinion that Mr. R.'s risk can also be managed adequately in the community. There is nothing to suggest that he could not maintain his high level of compliance on bail during a "primarily community sentence". Put simply, she concluded that "[Mr. R.] appears to be a young man with potential to be a successful member of society..."

120 Dr. Stevenson put it even more directly: long-term protection for the public would be emphasized by "minimiz[ing] the time spent [by Mr. R.] in custody, instead favoring a longer period of protection in the community." He said that if Mr. R. is incarcerated, a solid plan for his return to a prosocial path in the community should be in place upon his release. It was also considered important that he continue to upgrade his education, since he has the ability to complete high school and take post secondary training.

121 In Dr. Stevenson's view, Mr. R.'s only treatment needs are emotional support, continuing academic and vocational counselling and "reaffirmation of the importance of abstinence". His positive performance in the community since the offence shows that there are no other rehabilitation issues.

D. L.Z.

1. Personal Background

a. Age

122 Mr. Z. turned 18 about two weeks after the offence and is now 21.

b. Family

123 He was born in Saudi Arabia and lived there until he was about 10. After a period living in Dubai because of his father's employment (his mother advised the writer of the psychosocial report that they also lived in Oman for some period), the family came to Canada in 2008, originally living in Burnaby.

124 He met Mr. Golic in Grade 5 and they became best friends, a relationship that continued until this offence occurred.

125 His other family members are now Canadian citizens but he currently has only his permanent

resident status, which may have implications for him after he has served whatever sentence he receives in this case.

126 There were some tensions in his home due to strain in his parents' relationship. In addition, his mother suffers from ongoing depression, in response to which she was prescribed Xanax, one of the drugs that he came to abuse.

127 He lives with his parents and two younger siblings in Richmond. Because of a breach of his bail conditions in this case, he is subject to house arrest there, enforced by electronic monitoring.

128 There is evidence in the reports that Mr. Z.'s parents, especially his mother, are not fully knowledgeable or accepting of the extent of his offending.

129 His mother described herself as being very close to her son and as a result has covered for him when he has breached his probation orders. She claims to have moved the family twice to try to extract him from Mr. Golic's influence, without success (although, counterintuitively in light of that claim, she moved into a duplex next door to Mr. Golic's family in 2011, reasoning that it would be easier to keep an eye on her son and Mr. Golic if they lived close together).

130 Her position concerning Mr. Golic and his role in relation to her son's offending is also somewhat undermined by her presence, along with her daughter, in the vehicle driven by Mr. Golic's mother that transported the offenders to Whistler. Mr. Z. told Dr. Ley that because he and Mr. Golic were under 19 at the time, they had their mothers purchase four bottles of hard liquor and 24 beers for them en route.

131 Her position, as expressed in the psychosocial report is that Mr. Z. was an "angel" when he was away from Mr. Golic's influence. She downplayed his involvement in the offence underlying his previous conviction (a conviction for assault based on his joint participation with Mr. Golic in a robbery), suggesting that Mr. Golic had played the main role, including possessing the knife that was used to rob the victim. She also alleged that the victim of that offence had asked that the charges against Mr. Z. be dropped but the police refused. She further claimed he had been assaulted while he was in police custody.

132 It was shortly after this incident that Mr. Z. was expelled from school and began to withdraw, she said, and that she discovered that he had drugs at home. To her dismay, Mr. Z.'s relationship with Mr. Golic continued even though he was now in an alternative school.

133 To meet the family's financial needs, Mr. Z.'s father had to return to Saudi Arabia to work from 2008 to 2010, making only periodic returns during that time. When he returned permanently, he found that his son was falling under the "bad influences" of others and was "a follower". His father felt that he could not bring the full weight of his authority to bear in disciplining his son at this stage because Canadian law would not permit it - if he "was tough with him, or parented him, [Mr. Z.] would call 911". As a result he and his wife "failed to stop this relationship" - that is, with Mr. Golic.

134 More generally, the author of the psychosocial report commented that in light of the extensive criminal activities that Mr. Z. disclosed during the preparation of the reports, it seems that his parents either did not share their knowledge of his activities with her or had no idea what he was involved with.

c. Education

135 His attendance declined in Grades 8 and 9, as he began to skip classes regularly with Mr. Golic. He was suspended twice in Grade 9 for fighting. This is also the period in which he was introduced to drug

use and to other "delinquent peers", as Dr. Bartel, the author of the psychological report describes them. He was expelled from school in Grade 10 due to poor attendance. He said that he had been attending that year only because school was where he was able to sell drugs. He told Dr. Stevenson, who also prepared the psychiatric report in his case, that the only reason he lasted so long there was because his mother had a good relationship with school officials. He described himself as being "fully into crime" by the middle of that school year.

136 He then went to an alternative school. He had some initial success, showing interest in a career as an aircraft mechanic that was suggested to him by a teacher, but was eventually expelled from there as well. That occurred in February 2015, and was described in the psychosocial report as being due to "out of control drug use". A review of the school records shows a high number of absences and that, when he was there, he had trouble sitting still and engaged in childish behaviours - "as if it were more like he was in grade 4".

137 He completed his Grade 11 during the initial period in which he was being held in youth custody for this offence. As of the time of the pre-sentence report he had completed some Grade 12 credits as well.

d. Criminal history and compliance with supervision

138 His criminal record consists of the conviction for assault in 2014 that I referred to when summarizing his mother's attitude.

139 The progress of his criminal lifestyle, as he described it to Dr. Bartel, was that he had been interested in crime as far back as the age of 10. He began selling marihuana when he was 14 or 15, after his mother caught him using it and stopped giving him an allowance. He started to shoplift valuable items and then fence them. He told Dr. Stevenson that he occasionally engaged in fights in the community when he was in Grade 9 but was "circumspect or evasive with [the] details".

140 He estimated that before he was arrested for the incident underlying his previous conviction he had robbed people of cell phones and cash near a transit station 10-15 times. He stopped this particular practice, as well as the shoplifting, after being arrested for the robbery with Mr. Golic that led to his assault conviction. He started robbing street-level drug dealers, who carry large sums of money, instead. These robberies involved him carrying a gun, which he cocked to intimidate or used to pistol-whip his victims. He justified this use of violence on the basis that he was punishing the drug dealers for their crimes. Dr. Bartel noted that this was an increase in the seriousness and sophistication of his criminal activities.

141 Most significantly though, he developed skill at drug dealing and increased his operation to the point that he would receive his own marihuana for free and also earn profits. He claimed that by the time he was 17 he was earning \$7,000-10,000 per week in this manner and was "getting high all day long". He was able to handle all of the financial aspects of this business. Eventually he turned it over to others, while still receiving some of the proceeds.

142 He knew and was friends with members of the two major gangs that were warring in the Lower Mainland at that time. Through people he described as "peers in the underworld" he was present for, and participated to some extent, in more serious activities such as torture, gunfights between groups, beating people up and robberies. Being present for the torture was the most difficult, because it was someone he had known in the community. He declined to offer details of his involvement in this kind of violence, Dr. Stevenson noted, and emphasized that he had not told the interviewers "everything" about his activities of this kind.

143 His other involvement in acts of violence included hand-to-hand fights, having "shot at someone" on one occasion, being involved in drive-by shootings, and using various blunt weapons to assault people. There were constant conflicts - "politics" as he described them - among groups or individuals in the community. Earning "fearful respect" from peers was very important. A lot of violence between groups was going on in the winter before Mr. Gordic was killed.

144 He described his lifestyle from the age of 16 until he committed the offence against Mr. Gordic as centering on "crime, drugs, 'getting high' and girls."

145 He and Mr. Golic had begun committing crimes on their own, but over time they became involved with older and more criminally-involved associates, who viewed him like a little brother and, he told Dr. Stevenson, sheltered him from the worst violence. He said that he got Mr. Golic into the lifestyle but then Mr. Golic, who was charismatic, a good talker and had leadership skills, took over.

146 Money was a significant motivation initially, in the sense of taking a financial load off his mother. She knew about his drug dealing but did little to dissuade him, he said. Gaining money later became an end in itself. At the time, he enjoyed the crime and the violence.

147 He came to view violence as a normal activity and said that by the time he was 17 he had become desensitized to it. He told Dr. Stevenson that he can "'go numb' to everything" and then is unable get himself out of that state.

148 He told Ms. Ng, the author of the pre-sentence report, that he associated with a peer group that he described as "gangsters". He felt a sense of loyalty to them and reluctance to leave the group. He was also very impressed with Mr. Golic's uncle, a Hells Angels member who earned substantial amounts of money through the gang lifestyle and gave him the sense that he was being protected by the uncle's connections with that organization. He came to look on the uncle as a role model, but after the uncle was murdered, Mr. Z. said that he realized the precarious nature of relationships in the criminal world. His own associates had also begun to fight among themselves in a manner that caused him to doubt the code of honour that he formerly believed in, and he cut ties with them. He said that as a result of Mr. Golic's uncle's death, the pursuit of rank or status is no longer important to him.

149 He was arrested twice while on bail for the charge that led to his assault conviction, for violating the area restriction in his release. His sentence was for a twelve-month probation period that included a condition that he have no contact with Mr. Golic. His supervising probation officer recorded that he was doing well at home, attending the alternative school and working that summer, and abstaining from drug use. Mr. Z. disclosed during his interviews for these reports that in reality he was continuing his drug use and criminal activities. Despite the no contact order with Mr. Golic, he saw him daily and was actually living with him at one point during the probation period, with his parents' knowledge.

150 The same is true of his bail conditions in this matter. He told Dr. Bartel that he gave his drug business to others but continued to derive benefit from it while he was on bail, and continued to meet to discuss criminal activities with his associates at his home. He said that after his arrest for the bail breach, he asked his friends not to discuss the business with him. The no-contact bail conditions in this case did not include many of these associates. According to the psychosocial report, he also continued to have contact with Mr. Golic and at times left the home without being in the presence of his mother, both contrary to the bail conditions.

151 The motivation underlying the breach was his desire to get a tattoo to commemorate Mr. Golic's

uncle, who had been shot three months earlier but "died on the operating table the day I got breached." He told Dr. Bartel that he had asked his bail supervisor for a letter giving him permission to be outside the home to get the tattoo, but left the home during this incident without having picked the letter up. (He did eventually get the tattoo.)

152 When he found out that the police attended he had his mother drive him to the hospital and he sought admission and remained there briefly so that he could claim that was the reason for his absence. He had previously told his father that if the police attended at the home while he was out his father should tell them that he was at the hospital. He told Dr. Stevenson that the problem was that the time shown on the hospital wristband that he was given was later than the time police had checked at his house and found him absent. Dr. Ley summarized Mr. Z.'s description of this event as being that "he and his parents concocted a bogus alibi" for his absence from the home once they were aware that he had violated his curfew.

153 In the hearing to address this breach I rejected the defence that there had been an actual medical emergency requiring him to leave the home and found that Mr. Z. had breached the curfew condition of his bail.

154 He spent 55 days in custody at the youth detention centre from his arrest to his first release on bail. After his bail breach, he spent a further 27 days in custody, until being released again, this time on electronic monitoring.

e. Substance Use

155 Mr. Z. developed serious substance abuse problems as an adolescent. His initial use of alcohol and marihuana was as a 13-year-old. According to the pre-sentence report, Xanax was his drug of choice - it provided a numbing effect and "mixed well" with the marihuana that he used to cope with his Attention Deficit Hyperactivity Disorder ("ADHD"), a condition I will discuss further. He told Dr. Stevenson that Xanax made his brain "go quiet". He began his use of it by stealing from his mother's prescription supply and progressed to buying it on the street.

156 His further motivation for using Xanax was to numb himself to the violence he was exposed to in his criminal lifestyle, so that he would not be seen as weak by his peers. It eliminated guilt as well. He described Xanax as taking over his life. After his parents refused to provide him with money, he turned to drug trafficking to finance his habit.

157 At the height of his Xanax use he was combining it with marihuana and alcohol, the latter of which accelerated his level of intoxication and led to regular blackouts. He added alcohol to his addictions when his roommate (in the basement suite in which he was living at his parents' home) stocked the fridge with beer, which Mr. Z. began to drink daily. He described this roommate as an alcoholic and a "pothead".

158 His addiction to Xanax and its effects on him in combination with alcohol was an important aspect of his evidence at trial, in particular the absence of any memory of the critical events.

159 He also turned to the opioids codeine and OxyContin when he was 15 and 16 years old. He briefly became addicted to OxyContin before returning to Xanax. For a period he was taking codeine with his first Xanax of the day, but stopped after he developed an ulcer that was attributed to the codeine use.

160 He weaned himself from his Xanax addiction while in the youth detention centre. Despite this, he

took "a couple" of them from his mother's prescription supply during the trial, to cope with low mood, negative thoughts and his anxiety about testifying.

f. Mental Health History

161 He told Ms. Ng, the author of the pre-sentence report, that he was diagnosed with ADHD at the age of six. His teachers remarked on his inattentiveness and it held him back academically. He was on medication for it for two or three years when the family still lived in Saudi Arabia. His parents were not able to advise why specifically he stopped taking it.

162 The psychosocial report accessed records of a further formal diagnosis of ADHD by a psychiatrist to whom Mr. Z. was referred in 2013, as well as of cannabis abuse disorder and adjustment disorder. This was after he had been charged with the offence with Mr. Golic that led to his previous conviction. He had been referred to the psychiatrist because of his anxiety about the effect of the charge on his family's citizenship application and his schooling.

163 The psychiatrist's records show that Mr. Z. did not like the effects of the initial ADHD medication that he was prescribed. He went to his family doctor for a different medication. The psychiatrist then prescribed him the longer-acting form of that latter medication, which it appeared Mr. Z. did not like the effects of either.

164 He told Ms. Ng that he had stopped taking the medication that he was prescribed for it when he was 14 because he did not like its effects, instead turning to marihuana to manage his symptoms. He told Dr. Bartel that the medication made him feel like he was a "zombie" or "in a cloud" so he did not take it for long. According to the psychosocial report, he saw marihuana as a medication that helped him with his ADHD rather than as a problem requiring assistance. However, Dr. Bartel noted that Mr. Z. said it was Xanax that quieted his brain and helped him concentrate better.

165 He was referred by the psychiatrist to an addiction specialist, who recommended that he stop using marihuana and other mood altering drugs. He did not continue seeing that specialist.

166 In his interview for the psychological and psychiatric reports, he described numerous symptoms that are consistent with ADHD. He told Ms. Ng that he feels like "his brain to be always on fire, with thoughts running through his head" and that his thoughts never shut off. Dr. Stevenson reported a variation of that description - that although Mr. Z. had learned to shut it off, since the current offence he has been unable to stop thinking, "or it's more like a feeling [of vague anxiety]".

g. Employment

167 His only legitimate employment consisted of referrals for temporary construction work through a personnel company, which was arranged by a teacher at the alternative school. It was described in the pre-sentence report as being for six months and in the psychosocial history as being for the summer, but he told Dr. Bartel that he quit after a few weeks, because he did not like the nature of the work or being told what to do.

h. Current activities and attitudes

168 Under his current electronic monitoring regime, he is allowed out for limited periods each day, which he mainly spends exercising with a friend he has made more recently, who has no involvement in criminal activity. He also tries to keep to a daily routine, which includes cooking and growing tomatoes. He was

introduced to Buddhism by a cellmate at the pre-trial centre and has begun meditating regularly. He continues to perform the daily prayers required of him as a Muslim as well.

169 With respect to the circumstances of the offence, Mr. Z. emphasized to Ms. Ng that he did not have anything personal against Mr. Gordic, whom he knew from high school, and did not think he was going to die. He told Dr. Bartel that he did not think the incident "was supposed to happen" and did not know why it had. In later days and weeks after the offence he felt "used" by Mr. Golic for drawing him into it, when he had no personal grudge against Mr. Gordic.

170 He provided a brief but direct and seemingly heartfelt letter of apology to the Gordic family and letters from his parents, sister, a neighbour and someone in the community who has become familiar with him. They attest, variously, to his kindness and warmth in his family relationships, his unexpected demonstrations of his intelligence, his respectful treatment of others and from his parents' perspective, his struggles with ADHD and the longstanding malign influence of Mr. Golic.

171 In his interviews with Dr. Bartel and Dr. Stevenson, he added a very specific memory to the blank period that he had testified about at trial, between becoming intoxicated at the townhouse and coming to consciousness in police custody after the offence. It involved him looking into Mr. Gordic's eyes immediately after he was stabbed. Mr. Z.'s hand was "grabbing" the knife, which was in Mr. Gordic's side. He described the look of fear in Mr. Gordic's eyes and experiencing a sudden "powerful slap in the face and punch in the heart, as Dr. Bartel captured it. Dr. Stevenson gave a more direct quote in his report:

"I recall looking at him in the eye ... there was fear", and in a an instant "my life got brighter ... everything around me ... whoa, I'm on earth right now ... I felt woke ... that God just slapped me right in the face ... something super, powerful, gave me a punch right in the heart ... an electric shock of clarity ... I came back to earth that second that he looked at me ... we made eye contact - my knife was still in him." ... the re-connection with reality "was not good ... I ran as fast as I could from that feeling."

172 Similarly, he told Dr. Ley that his only other memory surrounding the offence was of taking the knife out of Mr. Gordic "and him looking at me", as Dr. Stevenson had quoted.

173 In addition, he told Dr. Ley in their interview that he had a "really vague" recollection of his former girlfriend hugging him, which she testified had occurred as he and the other members of the group advanced on Mr. Gordic, but he "seemed unsure" of the origin of that particular memory - his own, or obtained from other sources. However, later in his report Dr. Ley summarized this part of Mr. Z.'s account as being that he does not recall the former girlfriend hugging or restraining him, or pushing her away.

174 In his narrative to Dr. Ley he recalled someone screaming "Here you are, you little bitch!" but had "no clue" who it was, including having no confidence or certainty that he was the one who had said it.

175 On the extent of his intoxication at the time, he told Dr. Ley that he had been unable to perform sexually with the young woman at the townhouse because he was too drunk.

176 He said the knife he used was "some girl's" and that he did not know how it got there.

177 He told Ms. Ng that he had only met Mr. D. and Mr. R. "once or twice" before that weekend. He told Dr. Stevenson that he had known Mr. D. for about a month, but did not get along with him, and had just met Mr. R. that weekend, although he felt an immediate affinity with him and continues to view him in that light.

178 His motivation for going on the trip was that he and his friends wanted to relax in "a different environment" at Whistler because the previous winter had been very difficult, with a significant amount of violence among his friends and associates - group fights, shootings and people being run over by cars.

179 Although he had carried weapons in the past and inflicted violence, he stressed that it was always for a reason, whereas Mr. Gordic was "not a part of that world." He felt that he could have left the scene or taken other paths than the series of events that led to the killing. He referred to himself as being "a scumbag" at that point in his life.

180 He has thoughts about how "my life and everybody I knew [has been impacted]...I destroyed their lives." He later spoke of the effects of his actions as being that "I shocked and scarred so many people".

181 When he was first in custody after the offence, he was asking himself how it had happened (although, as Dr. Stevenson noted, not expressing that he should not have done it) and how he got to that point. He later spoke of an external force wreaking havoc on his and other's lives and characterized himself and Mr. Gordic as being the victims of fate. In Mr. Gordic's case this was because he had not died at the scene of the stabbing but afterwards, during efforts to save him at the hospital.

182 He expressed the sense that many people, including Mr. Gordic's family and his own family, need to see that he is "rightly punished" for the offence. He deserves to go to prison "one hundred and ten per cent" for his actions with respect to Mr. Gordic, but does not deserve a life sentence.

183 He expects to be deported to Tunisia after the expiry of his sentence because of his lack of Canadian citizenship. He plans to leave Canada in any event, because there is nothing for him here, no one will forgive him and there may be a contract out on his life.

184 He had not provided his version of the offence until he was questioned for the purpose of these reports and felt a "weight off his shoulders" for disclosing them, as well as some of the details of his criminal past.

2. Psychological and Psychiatric Assessments and Recommendations

a. Dr. Bartel

(i) Assessments, testing and diagnoses

185 Dr. Bartel found no evidence of any major psychological disturbance. However, Mr. Z. experiences periods of depressed mood and anxiety in relation to the current offence and the outcome of the sentencing. This includes difficulties sleeping. He has nightmares following his time in the pre-trial centre, despite having been prescribed the sedating anti-depressant Seroquel.

186 During his adolescence, Mr. Z. considered feelings of guilt and having a conscience to be signs of weakness and vulnerability. By taking Xanax, which relieved him of those emotional reactions, he was "more enabled to be criminal and violent". But after he stopped using Xanax, and in particular after breaching his bail and being incarcerated, he began feeling overwhelming guilt about this offence and numerous other matters. He describes himself as being unable to turn this emotion off and feeling like he is five years old.

187 He does not have anyone he feels comfortable approaching for emotional or social support and has never been able to discuss his problems with his parents. Testing showed him to be inhibited in personal relationships and to have difficulty expressing his feelings.

188 He performed in the low average range in intelligence testing and average to low average in academic ability. He had some concentration difficulties while taking the tests that are consistent with ADHD.

189 His personality profile was similar to those with a preference for stereotypical masculine activities and "intolerance and insensitivity on an interpersonal level". Those with this profile have a tendency towards highly disruptive relationships and to act out against others when demands are placed on them. Perhaps most importantly in this area, the results suggested a pattern of disinhibition, reflected in risk-taking and impulsive behaviour, and a tendency to be less bound by moral restraints than others.

190 Testing also revealed that he is experiencing a high degree of stress. He expresses numerous symptoms related to paranoid and suspicious thinking. Although there may have been some exaggeration involved, Dr. Bartel thought that the threats and negative intentions that have been directed towards Mr. Z. in the community as a result of this offence may provide some factual basis for these thoughts.

191 His depression and anxiety since being arrested for this offence qualify him for a diagnosis of adjustment disorder (which is a time-limited and less serious and debilitating problem in dealing with stressors in a person's life), with mixed depression and anxiety.

192 What would otherwise have been diagnosed as a substance use disorder has been placed in remission by the abstinence that his periods of incarceration have enforced.

193 His chronic criminality over a four-year period would have qualified him for a diagnosis of a conduct disorder, but that disorder is primarily applied to children and adolescents and is not usually considered to persist into adulthood. Adults who engage in this type of behaviour are diagnosed as having an Antisocial Personality Disorder ("ASPD"). Mr. Z. does not qualify for it however, both because he does not have some of the personality traits associated with that disorder and, more significantly, because he is no longer engaging in that kind of behaviour. While Dr. Bartel attributes this partly to the close control Mr. Z. is under through house arrest, he says that Mr. Z. has experienced a change in perspective and appears much less entrenched in "criminal values, attitudes and lifestyle".

194 Remaining concerns are his view of emotional vulnerability as a sign of weakness and his tendency to be a follower.

195 ADHD continues to cause significant problems for him, because he does not appear to be experiencing the lessening of the symptoms of it that sometimes accompanies the transition into adulthood.

196 Acknowledging the difficulty in being certain about the causes of violent criminal behaviour like the fatal attack on Mr. Gordic, Dr. Bartel suggested that factors involved included Mr. Z.'s ADHD, which gave him negative school experiences and made him susceptible to impulsive and socially inappropriate actions; his status as an immigrant; the absence of his father in the home for extended periods; and the conflict between his parents in the home and their inability to supervise and discipline him effectively. As a result, he gravitated to other "disaffected youth", in particular Mr. Golic, and in the absence of positive mentoring became attracted to the criminal lifestyle and the material wealth available through

participation in it, as exemplified by Mr. Golic's gang-connected uncle. Efforts to remove him from the lifestyle were ineffective.

197 It appears that only the combined effects of this offence, the murder of his role model, his incarceration and subsequent strict supervision and the likely lengthy jail term and possible deportation have motivated him to make positive changes. While it cannot be determined "[w]hether they are sustainable in the long term", Dr. Bartel's impression is that Mr. Z. is sincere in the changes he has made so far.

(ii) Risk Assessments, Opinions and Suggested Conditions

198 Mr. Z. scored low on the assessment tool for psychopathy, although some potential indicators of it were scored as "present" or "partially present".

199 Dr. Bartel acknowledged the complications in commenting on Mr. Z.'s current risk, because risk is a dynamic factor that is capable of changing over time. He applied the risk assessment tool designed for youth up to the age of 18 and supplemented it with one designed for adults.

200 The potential risk reduction that results from the passage of more than two years since the offence without Mr. Z. engaging in further offending is enhanced by the fact that he appears to have matured physically and cognitively since then. Negative attitudes and peer influence that were present at the time of the offence have also been reduced.

201 While Mr. Z. would have been a high risk to reoffend violently at the time of the offence, Dr. Bartel expressed the view that "[a]t this point in time...[his] risk is possibly much lower". This was because of his significant attitudinal changes - an increase in empathy and remorse, the abandonment of criminal values, ceasing substance abuse, having some prosocial goals, and taking some steps towards them.

202 On the other hand, Mr. Z.'s parents' ability to work with community supervision remains a concern, because in the past they have enabled his behaviour and have been incapable of setting and enforcing limits.

203 In addition, it is significant that he has not been free in the community during this recent more positive period and so the question of whether his risk is lower in the absence of external restraints has not been resolved.

204 Nevertheless Dr. Bartel believed that with "well thought-out and implemented plans and supports in place" Mr. Z. can realistically keep himself at lower risk over the long term. The effect of the offence on his and Mr. Gordic's family may serve as a deterrent against future similar behaviour. The consequences of being arrested and facing a lengthy period of incarceration appear to have been "corrective", although admittedly "at [a] grave cost to others".

205 If he did reoffend, Dr. Bartel thought that "targeted and instrumental" violence towards other young male peers in the context of "doing crime business" was the greatest risk.

206 He considered Mr. Z.'s maturity, both at the time of the reports and, to the extent that it can be determined retrospectively, at the time of the offence. He explained that adolescence is a developmental life stage characterized by greater risk taking, impulsivity and violence. The age range of 15 - 17 has the greatest frequency of violence across the human life span. It is also a period of psychosocial immaturity - susceptibility to peer pressure and risk taking are greater and the ability to empathize is much less

developed. Interestingly, most youth who begin antisocial behaviour at that age do not go on to offend, violently or otherwise, in adulthood. With respect to peer pressure, adolescents are more susceptible to the diffusion of individual responsibility that occurs when members of a group participate jointly in an offence - the so called "mob mentality".

207 Mr. Z.'s criminal associations were part of his pathway to this offence - he was a follower in need of approval, according to Dr. Bartel. He said that in all likelihood Mr. Z. would not have participated in this offence without the involvement of Mr. Golic and the participation of a large group to locate and attack Mr. Gordic.

208 In addition to the inherent limitations of empathy and remorse in adolescence, a concern here is that Mr. Z. took Xanax to relieve himself from emotional reactions to his offending, which he found unacceptable. He has now developed a deeper understanding of the wrongfulness of his actions and appropriate remorse and guilt, even though to an extent he still views those emotional states as signs of weakness.

209 Dealing with the specific circumstances, Dr. Bartel is inclined to accept Mr. Z.'s claim that he does not recall the offence, given his willingness to disclose other incriminating past activities. In addition, the intoxication that Mr. Z. describes would have disinhibited him - making him more likely to act on aggressive impulses and affecting his judgment and ability to assess the consequences of his actions.

210 In what he admits is "conjecture" however, Dr. Bartel questioned whether ADHD also contributed to the impulsive nature of Mr. Z.'s attack on Mr. Gordic.

211 The type of violence he inflicted was characteristic of his previous criminal activities; the differences being the fatal level of violence that he inflicted (although his previous acts of violence would have carried that risk) and its use against someone who was not criminally involved.

212 He was described in the alternative school records as demonstrating some silly and immature behaviour and to be a follower. On the other hand, he operated a sophisticated drug operation, including its financial aspects, and functioned largely independently of his parents. In fact, "in some ways he was in charge of his parents rather than the other way around", as Dr. Bartel put it. And when he committed the murder, he was weeks from the age at which he would have automatically fallen under the adult criminal justice system.

213 He demonstrated at least average cognitive and intellectual ability in the testing, and presented as thoughtful and capable in that realm in the interviews, but the level of maturity he presented would of course have been higher than at the time of the offence, two years earlier.

214 Mr. Z. seemed oriented towards a criminal lifestyle from early on and idolized Mr. Golic's gang member uncle, leading to his immersion in substance use and violence. However, the death of this role model, Mr. Z.'s involvement in this offence and his developmental maturation have led him to establish "a more prosocial identity and personality".

215 Dr. Bartel's key recommendations were that Mr. Z. should receive:

- * Psychological treatment to lower his risk, address attitudes that support violence and provide him with nonviolent coping and conflict resolution skills. In the federal system, this could be provided through high or moderate intensity violence prevention programs,

depending on how he is classified. Treatment programs are "less comprehensive and available" in the provincial system, but Mr. Z. could access "in house" services himself, which I took to mean individual counselling or other assistance that is available to an offender by request with an institution. Most importantly, Mr. Z. would need psychological services upon his release to address his hyper-masculine identity and discomfort with emotions, which could place him at risk to return to crime;

- * Substance abuse treatment;
- * Consultation for, and possible treatment of, ADHD; and
- * A lower security classification to avoid the victimization and negative influences that would accompany exposure to high-security offenders.

216 He expressed the view that Mr. Z.'s risk can be adequately managed in the community once he is released, but that there need to be prohibitions on substance use and contact with his co-accused or any "known criminals". Any non-compliance must be met with "swift and meaningful consequences".

217 A well-planned reintegration into the community would be extremely important, with residential, educational and vocational plans in place, as well as professional services. Rewarding and meaningful employment will be as rehabilitative as any intervention. As in the case of Mr. Z.'s prohibitions, close monitoring would be essential in the first few months to ensure compliance and proper adjustment. His parents, who have shown enabling and complicit behaviours, should not be part of the monitoring process.

b. Dr. Stevenson

(i) Impressions and Assessments

218 Dr. Stevenson gave an overview, in which conduct disorder, ADHD, substance abuse, cognitive distortions, and antisocial affiliations all contributed to the evolution of Mr. Z.'s criminality, and were in turn reinforced by his growing status and material wealth from engaging in crime.

219 He offered two perspectives, or "lenses", through which Mr. Z.'s offence could be understood.

220 In the first, Mr. Z. could be seen as a conduct-disordered youth who:

...pursued an impulsive, sensation-seeking behavioural course through early adolescence that would begin with serious substance abuse, escalate to criminal activity, and take him inexorably towards an emerging antisocial personality disorder. He would be seen as meaningfully and instrumentally the author of his own rise through the ranks of his criminal peer group, striving for power and respect through whatever coercive or violent means were required, culminating in an act that, even if unintentionally lethal, was a natural and expected derivative of his loyalty to his group, the common presence of violence in his life, the impulsively brazen and public attack to defend his best friend's 'honor'.

221 Through the second lens, Mr. Z.'s "childishly rebellious and prankish behaviors" with Mr. Golic were, over time, shaped into "something more sinister". He was an impressionable follower who was impressed, as an immigrant youth, by the power, respect and success of the Hells Angels uncle, while also still immature at times at school and strongly connected to his mother². Further:

One could extend this view right up to the moment of the [attack] when, caught up in a sudden, drug-fueled, group frenzy directed at [Mr. Gordic], he followed the momentum of "Let's go!", rushing forward not as the instigator of the attack but simply as an intoxicated, misguided best friend and ally of Mr. Golic, whose grievance with the victim was both spark and fuel for [Mr. Z.'s] impulsive actions.

222 Through either lens, despite Mr. Z.'s "criminal versatility", he was "not a mature or broadly sophisticated" young person, lacking "autonomy, positive self-esteem, good judgement with sound decision-making, self control (including the capacity to delay gratification) and emotional regulation skills."

223 Perhaps crucially, Dr. Stevenson observed that Mr. Z., "a criminally-experienced and street-wise youth, immersed in a violent subculture", did not begin to question his lifestyle after this offence, but rather after Mr. Golic's uncle was killed and the allegiances among his friends and allies began to break down.

224 Like Dr. Bartel, he noted that Mr. Z. took Xanax so that he was able to participate in "morally questionable behaviour" without feeling bad. He also made a similar observation to Dr. Bartel that Mr. Z.'s empathy and remorse now appear to be extending beyond his initial self-interest, to include reflection on his tragic actions and the trauma he caused. He too noted that Mr. Z. finds such feelings uncomfortable and overwhelming at times.

225 He described Mr. Z. as being of "broadly average intelligence", with weaknesses in processing speed and memory.

226 He is more measured in his assessment of the role played by Mr. Z.'s parents in his offending, saying only that they may have "unintentionally" enabled his behavior by their support.

227 Using the same risk assessment tools employed by Dr. Bartel, he found Mr. Z. to be a moderate risk for reoffending, unless the various negative factors are addressed. In particular, Mr. Z. needs treatment focusing on violent or antisocial attitudes and emotional regulation. However, his progress in attitude and empathy to that point might make it appropriate to reassess him using the tool for adult offenders in another six months, I take it to confirm that progress is continuing.

(ii) Opinions and Recommendations

228 Dr. Stevenson summarized that the offence could be viewed as "a highly impulsive act" committed by an "immature (albeit street wise) young person", well acquainted with violence and closely and unthinkingly allied with his best friend. Most importantly, Mr. Z. "[may] have reacted within a matter of seconds that allowed little time for serious consideration of the context or rationale for the attack, or even to fully anticipate the tragic fateful outcome."

229 Mr. Z. now has a greater appreciation of the gravity of his offence and is more mature. He demonstrates a "calm, mature acceptance" of the possibility of an adult sentence, recognizes that Mr. Gordic's family expects that outcome, and thinks it might help them find closure. He believes nevertheless that his sentence should be moderated by the circumstances, including his age at the time; his compliance with supervision over the past year; his acceptance of responsibility, growing regret, remorse and

empathy; his disconnection from his antisocial peers; the support of his prosocial family; and his intention to leave Canada for the Middle East after the completion of his sentence.

230 Candidly, Dr. Stevenson acknowledges that it is impossible to predict whether the positive changes that he has described will endure. If they do, Mr. Z. "may have reached a turning point" from which a relatively prosocial future can be salvaged. It is also impossible to predict what his performance would be in the community on something less restrictive than house arrest, so close supervision upon his release, with immediate consequences for a breach, is essential. Attention also needs to be paid to his environment and available resources. And, like Dr. Bartel, he stressed that Mr. Z.'s parents should not be seen as his main source of support.

231 The specific treatment needs Dr. Stevenson identified for Mr. Z. were similar to Dr. Bartel's:

- * Alcohol and drug counselling, despite his self-report of abstinence;
- * Focused violent offender treatment;
- * Psychotherapy to improve his emotional awareness and self-regulations skills and to address any trauma arising from his previous involvement in violence and this offence and the hyper-masculine attitudes that drew him to high-risk activities; and
- * ADHD treatment to address the issue of impulsivity.

232 Finally, as Dr. Bartel had, Dr. Stevenson also stressed that during any custodial period any prolonged exposure of Mr. Z. to entrenched criminals in a high security setting should be avoided.

c. IRCS Reports

233 Mr. Z. was referred for consideration of his suitability for an Intensive Rehabilitative Custody and Supervision Order under s. 42(2)(r)(iii) of the *YCJA*. Dr. Bartel and Dr. Stevenson conferred with each other and each produced reports. They also consulted with youth and adult corrections officials during the process.

234 Considering the legislative criteria, Dr. Bartel concluded identifiable mental illnesses or emotional disturbances are present, in the form of (1) Mr. Z.'s ADHD, which it appears still causes significant problems for him and (2) his substance use disorders, which are presently in remission due to his lack of access to substances and abstinence.

235 On the question of the reasonable grounds to believe that the treatment plan might reduce risk, Dr. Bartel candidly stated that "it is difficult to determine with any certainty that treatment/intervention will reduce risk". Nevertheless, given that ADHD and substance use were two of Mr. Z.'s risk factors, "[t]heoretically" interventions aimed at addressing them "might? lessen risk...That is,...there is a possibility that his risk for violence can be significantly lowered."

236 The specific interventions to be delivered in such a plan track to a large extent his and Dr. Stevenson's recommendations in the main reports. They would include:

- * Medical treatment for ADHD, to be delivered by a family physician or ADHD specialist;
- * Substance abuse treatment to identify the factors related to his previous substance problems and put in place interventions to maintain the abstinence that he reports having

been able to maintain (which it is essential to have available immediately upon his release into the community, where he will be most at risk). Dr. Bartel said it was unclear whether Mr. Z. could maintain abstinence once the external controls have been removed. If it does prove difficult, residential treatment could be considered;

- * Psychological treatment to lower his risk for violence; and
- * A one-on-one support worker to assist him in transitioning from custody and insure that residential, vocational and educational plans are in place.

237 Dr. Stevenson's report had a slightly different emphasis. He did not relate his findings with respect to Mr. Z.'s conditions and treatment needs as directly to the statutory criteria for an IRCS order as Dr. Bartel had.

238 He noted that Mr. Z. did not "present with overt indications of ADHD" but did "endorse" (which I took to mean reported) ongoing symptoms of it. As he described in his main report, ADHD can render a child or youth more vulnerable to participating in various kinds of risky and antisocial activities and can in some cases continue into adulthood, as seems to be happening in Mr. Z.'s case.

239 More relevant in his view, addressing substance abuse can be integral to reducing risk, including the behaviours related to obtaining drugs, behaviours while intoxicated, the exacerbation of symptoms of other conditions such as ADHD, and interference with more appropriate treatment for those conditions than self-medicating. In Mr. Z.'s case the onset of feelings of regret and remorse suggests that the use of substances during his offences was masking those feelings, rather than Mr. Z. being an inherently callous person.

240 No identifiable anxiety disorder was present, according to Dr. Stevenson, but coping skills to address stress and emotional dysregulation would be an important component of his substance use rehabilitation.

241 Although Mr. Z. previously qualified for a diagnosis of conduct disorder due to his repeated violation of "social and legal norms" throughout his adolescence, his lack of any known criminal behaviours during the 12 months before the report was prepared meant that such a disorder had "remitted". It appears that he is giving up some of the attitudes and behaviours that would have signalled the onset of its adult equivalent - ASPD (although later in the report he said that the possibility of ASPD is "not clear"). Despite this, Dr. Stevenson thought that Cognitive Behavioral Therapy ("CBT") to reinforce Mr. Z.'s current "prosocial trajectory" will be an important part of risk reduction and rehabilitation.

242 When relating ADHD and substance abuse to the resources provided under an IRCS, Dr. Stevenson made the potentially significant observations that Mr. Z.'s criminal and violent behaviors appear to have been instruments (deliberately enacted for material gain, reputation or power) and did not stem directly from either of those conditions. The stimulus-seeking elements of ADHD may have been a background amplifier of his antisocial attitudes and activities, and substances "were appreciated" for their side effects of helping him cope with negative feelings, but they were not the primary motivations for engaging in such conduct in themselves.

243 As to treatment needs, Dr. Stevenson explained that antisocial personality traits, once crystallized, are often not amenable to change. Since Mr. Z. appears to have retreated somewhat from the attitudes and beliefs underlying the emergence of ASPD, the CBT (if he engages with it) could help him further internalize these changes and "help reduce his risk substantially". CBT would also be the most helpful response to any ongoing difficulties with anxiety.

244 Intensive interventions are not required for his ADHD, but medication, self-monitoring techniques and changes to his environment to help him sustain attention can be helpful.

245 A relapse to substance use would be a significant risk factor for Mr. Z., because of its impairment of his emotions and judgments and the likely renewal of contact with antisocial peers. Despite his recent abstinence, his history leaves him vulnerable to relapse and accordingly he should complete drug and alcohol counselling.

246 Dr. Stevenson noted that violent offender programming is less comprehensive and potentially less available in the provincial system than in the federal system, keeping in mind the earlier recommendations that he and Dr. Bartel made about the importance of a lower security classification. As he had pointed out in his general report, close monitoring of Mr. Z.'s release into the community and the availability of further helpful interventions is perhaps the most important element of risk reduction of all.

247 Michelle Jokai, the probation officer responsible for the IRCS report on behalf of the Corrections Branch, prepared a report setting out the details of the proposed plan.

248 After referring to Dr. Bartel and Dr. Stevenson's conclusions that Mr. Z. meets the statutory criteria, she advised that "a treatment and intensive supervision plan has been developed and there are reasonable grounds to believe the plan will reduce the risk of [Mr. Z.] committing another serious violent offence in the future". She also advised that the "provincial director" for the purposes of the IRCS provisions had confirmed that the program is available and Mr. Z.'s participation had been "deemed appropriate". As required, Mr. Z. has consented to participate in this program.

249 Ms. Jokai made specific reference to the opinions that he would benefit from individual therapy to address his ADHD and substance misuse issues. She said that upon release he would also benefit from continued therapy to assist him in reintegrating into the community, as well as family therapy and support "if warranted".

250 Because he had expressed an interest in training in the area of "agriculture/horticulture", a psychological/vocational assessment was recommended to assist in determining if he is suited to such a career. If he is, some of the funding could be applied to his tuition fees, given the benefits of vocational training in reducing his risk of reoffending.

251 A one-on-one support worker would be beneficial to assist in his reintegration to the community, she wrote, in areas such as acquiring life skills, access to education and employment, prosocial interactions and activities, and complying with court conditions.

252 The in-custody portion of the plan provided for treatment and counselling focused on ADHD and executive functioning, educational and vocational support and tutoring and the vocational assessment, funded at an annual cost of \$25,000.

253 The community portion maintained the ADHD/executive functioning and educational and vocational training, but added the one-on-one support worker for an average of six hours per week, a four-month inpatient substance abuse program, residential living expenses, recreation and "structured pro-social activities", family support counselling and psychotropic medications. The annual cost for these supports was \$88,000.

254 If Mr. Z. is transferred to a federal institution, the IRCS funding will be suspended for that period "as

the rehabilitative needs of the youth will be met and addressed by the programs and services offered by federal corrections", as Ms. Jokai put it. I infer that they would resume for the community portion of the sentence however.

d. Dr. Ley's report

255 I have summarized the key elements of this report separately because (1) it follows a different format than the other reports and (2) it comments extensively on the assessments carried out and opinions expressed by Dr. Bartel and Dr. Stevenson, making its key points easier to understand after their reports have been summarized.

256 The version of the events preceding the offence that Dr. Ley obtained generally tracks the narrative that Mr. Z. has provided to other report writers. I have referred to the additional potential memories surrounding the events that he provided to Dr. Ley in my previous summary of his current attitudes.

257 There was one notable misunderstanding in Dr. Ley's report, which Mr. Z.'s counsel corrected during submissions. Dr. Ley described the IRCS funding as being available only for sentences served in the federal system when, as I have described, it is actually available only within the provincial system and is suspended in favour of the federal systems' internally-available programs if the offender is sent to a federal institution.

258 He used the same tools to assess Mr. Z.'s risk as the other experts had. He noted, like Dr. Bartel, that while the youth assessment tool is meant to apply to offenders up to the age of 18, there are few empirically validated tools for someone of Mr. Z.'s age (20 at the time of that assessment). Dr. Ley takes the position, as I will explain, that Mr. Z. was an immature youth who acted younger than his age during adolescence and so that tool is still a useful means of identifying relevant risk factors, keeping in mind its age limitations. In any event, the adult-oriented tool can be used for those as young as 20.

259 Dr. Ley did not form an impression of Mr. Z.'s intelligence that was at odds with the other assessments. Based on Mr. Z.'s thought and speech processes, as well as his "educational accomplishments" (such as they were) he took him to be in the lower end of the average range of intelligence. The results of the intelligence testing made sense in Dr. Ley's analysis - Mr. Z.'s processing speed and working memory were "degraded" by his ADHD, which his distractibility during testing further supported.

260 As to general impressions, Dr. Ley did not find Mr. Z. to be "glib, facile or manipulative", or that he attempted at any point to establish himself as a "formidable, sophisticated high status offender who should be respected". Like Dr. Bartel and Dr. Stevenson had, he noted Mr. Z.'s openness about and willingness to disclose his past criminal activities and substance use, even though much of it was not a matter of public record.

261 He also agreed that Mr. Z. did not appear to be secretive or evasive in his lack of recall about the events leading up to the offence, while also frankly acknowledging that Mr. Z. "may be lying" and that it is not his role to assess credibility.

262 He found Mr. Z. more "reflective and insightful" than he had anticipated, which he thought was likely due to Mr. Z. having abstained from substance use and the psychologically sobering effect of the offence. In particular, he had insights with respect to: his resentment towards his father from the family's difficult economic circumstances when they arrived in Canada, his emulation of Mr. Golic's uncle, and his own need for status and respect from his peers.

263 Dr. Ley drew a link between those difficult family circumstances, which required Mr. Z.'s father to return to Saudi Arabia to work and the monetary benefits he associated with the criminal lifestyle of Mr. Golic's uncle, including Mr. Golic's higher quality material possessions which, "rightly or wrongly" he attributed to the uncle. In Dr. Ley's view, Mr. Z. idolized the uncle and used him as a role model. He described the uncle as his idol and teacher - "he was a father figure for me... we were like his ... sons ... I was his second favourite." The uncle posted the surety for his and Mr. Golic's bail release, for example, and Mr. Z. implied that the uncle was also financially supportive of his family when they were in need. Mr. Z. called the uncle "an amazing person" and was deeply affected by his death, which caused him to end his glorification of the criminal lifestyle.

264 Despite describing the neighbourhood that he and Mr. Golic lived in as a ghetto, he and Mr. Golic were socially successful and popular there. Over time he developed a belief in the status that would accrue to him for performing well in fights with other youths. He noted that the alternative school that he went to after getting expelled from his high school had "some really violent kids". However, he did not bully, nor was he bullied by, others during this period, he maintained.

265 He recognized that he had chosen friends from among antisocial criminally- oriented youths and that prior to Mr. Gordic's death he was unwilling to change his attitudes or conduct. The allure of money was "number one" but he also experienced a powerful sense of respect, status and relative invulnerability - in the rough neighbourhood in which he was living criminals were left alone. Dr. Ley expressed the view that Mr. Z. was addressing feelings of vulnerability by his criminal pursuits.

266 He was not affiliated with specific gangs, even though he knew many people who were.

267 Mr. Z. called Xanax "a superman drug". He enjoyed the relaxing, sedating and numbing effect of it. As he put it, "you can do any thing...you wont feel anything...you just don't care and you feel great!" As to other drug use, he was most specific about his relatively brief period of codeine use - for about six months when he was 16 - and confirmed that it gave him the stomach ulcer.

268 Once he began drinking more heavily, his combined use of alcohol and Xanax meant that it was not uncommon for him to have 10 blackouts per month on average.

269 This combination of substances ramped up in the three months before the offence, during which time he said he was significantly impaired on a daily basis. His drinking at night usually consisted of four to six beers and "many" shots of liquor. He was consuming large amounts of alcohol and Xanax "100 percent of the time". He was engaged in a lot of fighting of other groups of youths, as part of a group of his own in the year before the offence but especially in that three months. He acknowledged that his companions would use weapons in these fights, most commonly bear mace, but he did not need to, because of his boxing prowess. The most serious effect of these fights on him was to have been maced during some of them.

270 On the issue of weapons use, he claimed he had not been armed with a knife in a fight before the attack on Mr. Gordic. He had brandished knives and other weapons in robberies to obtain compliance from victims. He denied firing a gun or pistol-whipping anyone with one, as the other reports indicate. He found that cocking it as though to fire it was sufficient.

271 Dr. Ley noted a strong sense of emotional distress, especially sadness, whenever Mr. Z. discussed the offence. Mr. Z. described himself as "the most responsible" for what occurred, as among himself, Mr. D. and Mr. R. He deserves what is happening, he said, but hopes he is not sentenced as an adult. Dr. Ley

interpreted this as a full acceptance of responsibility, with a corresponding absence of any attempt to shift blame to the other participants or to his degree of intoxication.

272 His impression was that Mr. Z. was regretful and remorseful for his wrongdoing and empathetic with Mr. Gordic, his family and friends. He showed physical signs, such as handwringing, which Dr. Ley thought could be indications of internalized trauma as a result of the offence. Mr. Z. fears reprisals as a result of having committed it, particularly during his inevitable period in custody under a youth or adult sentence.

273 Mr. Z.'s expressed appreciation towards his mother in particular and his family in general, despite having previously ignored their "feeble" efforts at parental control. He was emotional about the risks he has created for them, including his younger siblings, by his participation in this offence. His enhanced perspective now enables him to appreciate his mother's efforts and the benefits that would have resulted he had followed her directions. (Notably with regard to his problematic inseparability from Mr. Golic, he indicated that his mother and Mr. Golic's mother were "best friends"). Dr. Ley described Mr. Z. and his mother as having a "highly enmeshed relationship".

274 He was at pains to emphasize to Dr. Ley how much he had changed between the offence and the assessment (just short of three years later) and expressed confidence that others would notice his improvements.

275 He had a very positive experience at the youth custody centre when he was initially held there, because of the help they gave him to gain insight into his substance abuse problem, and his opportunity to restore his health there. In contrast, he found the adult pre-trial centre crowded and horribly violent, including an incident he witnessed in which an offender was deliberately scalded with boiling water.

276 In addition to the non-criminally involved friend with whom he exercises, he has a platonic female friend who attends university and has been very supportive. He has resumed his romantic relationship with the former girlfriend who was present at the time of the offence and hopes that will become a long-term, committed relationship. He has an interest in plants and gardening and some thoughts about pursuing a career in horticulture (in the interviews with Dr. Bartel and Dr. Stevenson he had spoken of pursuing it after he is deported).

277 Overall, Dr. Ley expressed the opinion that at the time of the offence Mr. Z. was very maladjusted on all fronts (psychological, emotional, behavioral and social); had a consolidated antisocial attitude and a strong criminal orientation that had been established in early adolescence; was very hedonistic and materialistic and "very immature". In terms of applicable diagnoses at that point, he had a severe conduct disorder, a number of severe substance use disorders and ADHD. His life was without structure, obligation or prosocial activities. And, despite their best intentions, his parents were weak and ineffective disciplinarians.

278 At the time of the offence, he would have been diagnosed as an "exceedingly high risk" for violent crime, which came tragically true in Mr. Gordic's murder.

279 Dr. Ley agreed with the pathways to this violent offence that were identified by Dr. Bartel and Dr. Stevenson and his opinions and recommendations do not differ significantly from theirs. He added additional factors that influenced Mr. Z: his early, unbreakable friendship with Mr. Golic and his family's economic difficulties upon arriving in Canada, leading to his father's absence and his looking to Mr. Golic's uncle as a surrogate, and in turn making it easier for him to progress to a criminal lifestyle.

280 Dr. Ley saw indications that Mr. Z.'s anxiety was longstanding and that it played a role in his severe substance dependence in his youth.

281 In his opinion Mr. Z. is currently diagnosable with (1) ADHD: combined presentation and (2) substance use disorders. The latter are in "sustained" remission but the remission has only occurred in a controlled environment so far. His emotional symptoms justify a diagnosis of adjustment disorder: mixed anxiety and depressed mood, but they are not sufficient to support a diagnosis of major or sustained depressive disorder. Dr. Ley agrees that it is premature to diagnose him with ASPD.

282 Dr. Ley's scoring of the psychopathy checklist was almost identical to Dr. Bartel's, indicating that Mr. Z. is not psychopathic. He would have received a higher score at the time of the offence however, before the positive adjustment of the last two years. The current score places him at a low to low-moderate risk for violent recidivism, which he describes as "manageable".

283 His scoring of the youth assessment tool was similar to Dr. Bartel's, and he agreed that a number of protective factors have emerged since the murder that reduce the risk for violent recidivism. This leads to a low to low-moderate and manageable risk as well. He scored the adult tool as Mr. Z. being a moderate risk to reoffend, as Dr. Stevenson had.

284 The most positive gains have been made since his bail breach and the resulting house arrest, about 15 months before Dr. Ley's report. The key gains he identified have been:

- * Discontinuing substance abuse and friendships with criminally oriented peers;
- * Establishing a healthy lifestyle (nutrition, exercise and spiritual and religious practices);
- * Showing a strong motivation to head in prosocial directions;
- * Increased emotional depth and sensitivity to others; and
- * Motivation to participate in comprehensive psychological treatment and rehabilitation initiatives to extend and consolidate his change in values.

285 In Dr. Ley's opinion, Mr. Z.'s motivation is genuine. He acknowledges of course that the changes this far have occurred in the context of significant external restraints and he agrees, as Drs. Bartel and Stevenson have stressed that "only time will tell" whether Mr. Z.'s conduct in custody and in the community can consolidate these positive steps.

286 He sees the murder as having triggered an "identity crisis" in Mr. Z. which has caused him to examine aspects of his "life and psyche" and commit to new ways of thinking, feeling and behaving which are not criminal. He agrees with Dr. Bartel's list of the combination of factors that have served to motivate and mature him, so that his risk of violent recidivism has been reduced.

287 In his view Mr. Z.'s educational and vocational plans are "concrete and attainable", despite his past poor attendance and performance in school.

288 The most likely destabiliser in future would be Mr. Z.'s return to substance abuse.

289 Any release plan for Mr. Z. would have to have a system of checks and balances built in, he said, with increasing freedom only on demonstrated compliance. While he has performed poorly on community

supervision in the past, he had received negligible treatment for his serious problems, which he is now genuinely motivated to receive.

290 In Dr. Ley's view, Mr. Z. needs to:

- * Complete his Grade 12;
- * Take a treatment program for violent offenders while in custody, as well as relapse prevention programs, in custody and in the community. He believes that the moderate intensity violence prevention program in the federal system is sufficient, rather than the high-intensity one;
- * Take substance abuse and relapse prevention programs while incarcerated;
- * Receive individual psychotherapy, which is in Dr. Ley's view the foundation of his positive prognosis, including dealing with conflicting emotions, developing better coping abilities and addressing depression and anxiety. A trusting, secure relationship with an experienced psychotherapist (preferably an older male) would be key to this. He was able to form a good rapport with a counsellor at the youth custody centre and this was very beneficial to him in the substance abuse realm; and
- * Receive a comprehensive psychiatric assessment from an expert in ADHD, including determining whether there is medication that he can tolerate that will help him. If medication is not prescribed as part of that regime, CBT will be helpful to address ADHD-related symptoms. It may be difficult to have that type of medication prescribed in the federal setting (because inmates abuse it as a stimulant) and CBT for this purpose is not offered there. However, Dr. Ley recommends (if possible, I infer) that medication be started while Mr. Z. is in custody and continued on his release, because of its significant benefits for his educational and vocational performance and interpersonal relationships.

291 He said that at the time of the offence Mr. Z. was an "immature person who was very susceptible to peer influence". He has matured significantly and distanced himself from the influence of Mr. Golic and his peer group. Dr. Ley agrees with the mob mentality element identified by Dr. Bartel, operating in conjunction with Mr. Z.'s need to be seen as a violent person by his peers, the influence of Mr. Golic and the disinhibition provided by substance use. He also lacked empathy and remorse, which he has begun to develop in the ensuing period, to become aware of his emotions and put aside his hyper-masculine identity.

292 Overall, Dr. Ley offers the opinion that the structure of youth sentence is, from a psychological standpoint, sufficient for addressing Mr. Z.'s treatment and rehabilitative needs while bridging him to the community, where he can receive specialized and necessary treatment that is not available in custody. In particular, he needs individualized psychotherapy, which is not available except through an IRCS order. All of the custodial programs that would benefit him can be completed in the framework of a youth sentence. And he would be sufficiently manageable in the community portion of such a sentence, in Dr. Ley's opinion, with the usual restrictions and controls on his behavior. He views Dr. Bartel's report as implicitly endorsing the greater benefits of a youth sentence as well.

293 In contrast, he believes that an adult sentence, with a minimum of seven years in custody, would provide Mr. Z. with an undesirable exposure to older, more sophisticated and hardened criminals. Many of them will resemble Mr. Golic's uncle and Mr. Z. is vulnerable to seeking acceptance from older

criminals. Given prolonged exposure, he may come to endorse those values again. It will also put at risk the positive gains that he has made so far.

294 Although Dr. Ley endorsed the specialized resources available under an IRCS, his view of how the programs could be provided - in a federal setting at the start of his youth sentence and then continued in the conditional release portion of his sentence - is contrary to the Corrections policy about suspending IRCS programs during the federal portion of a sentence that I have previously described. Mr. Z.'s counsel explained that Dr. Ley should instead be understood as recommending a transition between the IRCS programs that are provided during the custodial portion of a youth sentence (during which he could be kept in a provincial adult correctional facility) and those that would be available to him during the conditional supervision portion in the community.

V. LEGAL PRINCIPLES - YOUTH VS. ADULT SENTENCE

295 Section 72(1) of the *YCJA* provides that the court "shall" order an adult sentence if it is "satisfied" that (a) "the presumption of diminished moral blameworthiness or culpability of the young person has been rebutted" and that (b) "a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour".

296 The onus of satisfying the court of the matters set out in s. 72(1) is on the Crown. It has been described as "satisfaction after careful consideration by the court of all relevant factors": *R. v. Chol*, [2018 BCCA 179](#), citing *R. v. McClements*, [2017 MBCA 104](#), leave to appeal ref'd [\[2017\] S.C.C.A. No. 488](#). Justice Donegan in *R. v. R.K.*, [2017 BCSC 1510](#) at para. 91 said that it is a decision "requiring significant care, in line with the impact of a young person potentially receiving an adult sentence".

297 Both elements of s. 72(1) must be satisfied for an adult sentence to be imposed.

298 Even though there is considerable overlap in the matters to be considered under them, the two subsections of s. 72(1) must be considered separately. Moral blameworthiness is important in both analyses, but under s-s (a) the question is whether the moral blameworthiness is that of a youth or an adult, while under s-s (b) the question is whether a youth sentence would be proportionate to its level. The same factor may weigh differently under each heading: *Chol* at paras. 38, 43-44.

299 The test under s. 72(1)(a) reflects the fact that a young person has heightened vulnerability, less maturity and a reduced capacity for moral judgment. It can be rebutted by the Crown by showing that the young person possessed the level of maturity, moral sophistication and capacity for independent judgment of an adult: *Chol* at para. 59, citing *R. v. M.W.*, [2017 ONCA 22](#), leave to appeal ref'd [\[2017\] S.C.C.A. No 109](#) and *R. v. D.B.*, [2008 SCC 25](#). The presumption of moral blameworthiness that must be rebutted is as of the time of the offence: *M.W.* at para. 98.

300 The Crown has cited *R. v. Pratt*, [2007 BCCA 206](#), to support the assertion that the closer a young person is to being an adult at the time they commit the offence the less impact the statutory presumption of reduced maturity and culpability should have. *Pratt* dealt with the question of the extent to which the sentence to be imposed on a young person who was being sentenced as an adult should differ from that imposed on an actual adult offender. Justice Saunders observed that "[o]nly as the age of the offender approaches the cut-off age in the definition" that the sentence imposed is likely to be the same as on an adult offender for an otherwise identical offence (para. 57). Saunders J.A. was not specifically discussing the threshold for imposing an adult sentence. However, she added the more general observation that the *YCJA* "recognizes that a young person's maturity, like their physical stature, increases progressively, as,

too, their dependency diminishes gradually, until he or she reaches the stage of full accountability" (para. 54).

301 In *R. v. Wong*, [2016 BCCA 305](#) at para. 46, Justice Bennett cited *Pratt* for the principle that the youth-based "moderation of a *YCJA* sentence may lessen--depending on the circumstances--the closer one is to the age of 18 years". Unlike *Pratt*, Bennett J.A. was specifically addressing whether the offender should have received a youth or adult sentence, and relied on *Pratt* in the course of affirming the sentencing judge's ability to consider the offender's age - five months short of his 18th birthday in that case - when applying the criteria for an adult sentence.

302 In *Chol* at para. 60 Justice Stromberg-Stein described the analysis under this subsection as a "case-dependent, fact-dependent determination", considering the circumstances of both offence and offender. Stressing that what she was providing was not exhaustive and not a checklist and that that it would need to be tailored to each specific case, Stromberg-Stein J.A. at para. 61 said that consideration should be given to certain factors.

303 With respect to the offender, factors include: age; background and antecedents; whether they were living like an adult at the time of the offence and whether that was by choice; previous offences; dependence on or vulnerability to the influence of others; and cognitive limitations or emotional or mental health issues (although it was emphasized that this last set of factors should not overwhelm the analysis).

304 With respect to the offence, factors include the presence of impulsiveness, bravado or a sense of invincibility; planning or premeditation; the maturity of the reasoning underlying its motive; the role the young person played; their choice to engage in the activity; critical thinking and adult-like judgment demonstrated by their actions; follow through with the offence or attempts at covering up after it was initiated; and an understanding of the consequences of their actions, in terms of the impact of them on others and the resulting criminal sanctions.

305 Lastly there is the issue of post-offence conduct: whether it shows acceptance of responsibility or demonstration of remorse and whether their subsequent personal growth or lack of it demonstrates anything meaningful about them at the time of the offence.

306 Depending on the circumstances, the presence of some of these factors could count for or against the presumption being rebutted.

307 Rehabilitation prospects and risk factors will normally be relevant to s. 72(1)(b) since they deal with future conduct rather than the situation at the time of the offence: *Chol* at para. 54.

308 Section 72(1)(a) is a legislative reflection of the decision in *D.B.*, in which the Supreme Court of Canada found that the presumption of diminished moral blameworthiness is a principle of fundamental justice and struck down a previous version of the section that placed the onus on the young person to show why they should not receive an adult sentence. Despite having affirmed the existence and importance of this presumption however, Justice Abella, for the majority observed that:

76 No one seriously disputes that there are wide variations in the maturity and sophistication of young persons over the age of 14 who commit serious offences...

and that:

77 This does not mean that an adult sentence cannot be imposed on a young person. It may well be that the seriousness of the offence and the circumstances of the offender justify it notwithstanding his or her age.

309 In *R. v. J.F.R.*, [2016 ABCA 340](#), leave to appeal dismissed [\[2016\] S.C.C.A. No. 560](#), at para. 30, Justice Rowbotham helpfully explained that the variation in outcomes of Crown applications for adult sentences, even when the circumstances of the offences are equally serious, is due to the differences in the circumstances of the offenders involved. In that case, the sentencing judge was found to have erred when imposing an adult sentence for second degree murder, by giving insufficient emphasis to evidence of immaturity and vulnerability in the offender's background, despite the serious circumstances of the offence itself.

310 Under s. 72(1)(b) the concept of accountability, which the Crown must show that a youth sentence would not be of sufficient length to ensure, is equivalent to the concept of retribution as it was defined by the Supreme Court of Canada in *R. v. M.(C.A.)*, [\[1996\] 1 S.C.R. 500](#) at paras. 80-81, and as it was subsequently codified in s. 718.1 of the *Criminal Code* (as the concept of proportionality).

311 As a result, s-s (b) is rebutted if a youth sentence would not properly reflect the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct: *R. v. Wong* at paras. 29-31, citing *R. v. A.O.*, [2007 ONCA 144](#) at paras. 42-49. Thus, a sentence must "must be long enough to reflect the seriousness of the offence and the young person's role in it": *R. v. McClements* at para. 48.

312 To address rehabilitation sufficiently under s. 72(1)(b) it is not required that the sentence in question "secure" the offender's rehabilitation - which in most cases would be virtually impossible to predict. What is required instead is "...that it promotes his or her rehabilitation and reintegration into society": *A.O.* at para. 58. The Court also expressed the question as being whether "the length of time that could be afforded by the imposition of a youth sentence was [...] sufficient to foster [the offender's] rehabilitation in a meaningful and realistic fashion" and whether "a youth sentence would...sufficiently promote [the offender's] rehabilitation to meet the requirement of accountability established by the *YCJA*": para. 61.

313 The Manitoba Court of Appeal in *McClements* was more specific - requiring that the sentence must be "long enough to provide reasonable assurance of the young person's rehabilitation to the point where [they] can be safely reintegrated into society": para. 70. However, this formulation is not in conflict with what was expressed in *A.O.* - it originates in an Ontario Superior Court decision - *R. v. Ferriman*, [\[2006\] O.J. No. 3950](#) - that the Court in *A.O.* cited with approval earlier in that judgment, at para. 50.

314 Donegan J. applied this latter standard of "reasonable assurance of [the offender's] rehabilitation to the point where [they] can be safely reintegrated into society" in *R.K.* at para. 133. Showing the essential compatibility of such a standard with the language in *A.O.* however, she also quoted *R. v. K.M.*, [2017 NWTSC 26](#) at para. 26, which had stressed that "'[r]easonable assurances' as to the young person's rehabilitation do[...] not amount to absolute certainty: it means a reasonable prediction of future behaviour based on an evaluation of all of the evidence."

315 As s. 72(1)(b) indicates, the youth sentence against whose length accountability is to be assessed is one imposed in accordance with s. 3(1)(b)(ii) and s. 38 of the *YCJA*.

316 Section 3(1)(b)(ii) is one of the overall areas of emphasis of the youth criminal justice system that is established s. 3(1)(b): "fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity".

317 Section 38 sets out the principles that are applicable to youth sentences. Such sentences are governed by the overall purpose of holding young persons accountable by imposing "just sanctions" that have "meaningful consequences" for the young person, promoting their rehabilitation and reintegration into society (s-s. (1)).

318 Relevant considerations in s-s (2) include the requirements of:

- * being no greater than the sentence imposed on an adult for a similar offence;
- * parity with sentences on similar offenders for similar offences in this region (s-s. (b));
- * proportionality (s-s. (c));
- * considering all available sanctions than imprisonment that are reasonable in the circumstances (s-s. (d));
- * ensuring that the sentences must be the least restrictive ones capable of achieving the overall goals in s-s (1), the most likely to rehabilitate and reintegrate; and
- * promoting a sense of responsibility and acknowledgment of the harm done (s-s. (e)).

319 Subject to proportionality, the sentence may optionally reflect the additional objectives of denunciation and specific deterrence (s-s. (f)).

320 Subsection (3) adds some specific matters that are to be taken into account, including the degree of responsibility of the young person in the offence; the harm done and whether it was intentional or reasonably foreseeable; time spent in custody; previous findings of guilt; and any other aggravating and mitigating that are relevant to s. 38 principles.

321 Finally, para. 70 of *McClements* made clear that the Crown has met its onus under s-s (b) if it shows that a youth sentence would not achieve accountability on the basis of either moral blameworthiness or rehabilitation.

VI. RELEVANT FEATURES OF YOUTH AND ADULT SENTENCES

322 If Mr. D. and Mr. R. are sentenced as youths then pursuant to s. 42(2)(o) of the *YCJA* they will receive a custody and supervision order for a period of up to three years, in which they are committed to custody for the "first part" of the sentence and will serve "the remainder" under conditional supervision in the community. The apportionment of the custody and conditional supervision portions, within whatever overall length of order is imposed, is up to the sentencing judge.

323 The mandatory and optional conditions of the supervision portion are listed in ss.105(2) and (3). They will be imposed at a hearing held pursuant to s-s (1) at least one month before the offenders' release.

324 If they are sentenced as adults then they are subject to the sentencing regime for manslaughter under the *Criminal Code*, which, pursuant to s. 236(b), has a maximum sentence of life imprisonment and, since this case does not involve the use of a firearm, no minimum sentence. Despite the absence of a minimum sentence, s. 742.1(c) of the *Code* provides conditional sentence orders are not available for offences with a maximum term of imprisonment of 14 years or life, which means they are not a sentencing option for manslaughter.

325 If Mr. Z. is sentenced as an adult then pursuant to s. 745.1(c) of the *Code* he will receive a sentence of life imprisonment without eligibility for parole until he has served seven years of his sentence.

326 If he is sentenced as a youth, then pursuant to s. 42(2)(q) he will serve a sentence of seven years, which will be comprised of a committal to custody that is not to exceed four years and a placement under conditional sentence in the community pursuant to s. 105 for the balance.

327 As an alternative, s. 42(2)(r)(iii) permits a court, in the case of second degree murder, instead to impose an IRCS order, as was described in the summary of the experts' recommendations. Its structure consists of continuous rehabilitative custody for not more than four years, followed by a placement under conditional supervision to be served in the community for not more than three years.

328 The requirements set out in s. 42(7) for such a sentence to be imposed (in addition to the nature of the conviction, which is satisfied here) are that:

...

- (b) the young person is suffering from a mental illness or disorder, a psychological disorder or an emotional disturbance;
- (c) a plan of treatment and intensive supervision has been developed for the young person, and there are reasonable grounds to believe that the plan might reduce the risk of the young person repeating the offence or committing a serious violent offence; and
- (d) the provincial director has determined that an intensive rehabilitative custody and supervision program is available and that the young person's participation in the program is appropriate.

329 As Ms. Jokai described, an IRCS accesses federal funding for additional rehabilitative programs, up to a value of \$100,000 per year beyond those which are normally provided by corrections authorities in the custodial and community settings. These programs can be tailored to the needs of the offender.

330 If the custodial portion of a youth sentence is more than one year, s. 94(1) requires yearly reviews, as a result of which the sentence may be modified.

331 Breaches of conditional supervision are dealt with pursuant to s.109 and can result in a variation of the conditions or a continuation of its suspension, with the offender remaining in custody for up to the full overall period of the youth sentence.

332 In a more serious situation, if there are reasonable grounds to believe that the offender is likely to commit an offence causing death or serious bodily harm, the provincial director may apply for a continuation of the custodial portion of the sentence.

333 Because they are all more than 20 years old now, if any of these offenders receive a youth sentence, s. 89(1) of the *YCJA* requires that they serve it in a provincial facility for adults. A youth facility is not an option for them.

334 If the custodial portion of their sentence is two years or more the provincial director may apply to the youth justice court pursuant to s. 89(2) to have them serve it in a federal institution. According to the IRCS report provided by probation officer Michelle Jokai, "it is often considered appropriate" for

Corrections to make that application with respect to "a mature youth". As previously indicated, the significance of that approach to the IRCS process is that provincial policy is to suspend the programs provided under an IRCS while the offender is in federal custody, on the basis that the offender's needs will be met by the programs that are provided in a federal institution.

335 According to probation officer Ray Stellingwerff, who prepared the placement reports for these offenders, adult provincial facilities are classified as minimum, medium and secure. Minimum facilities may permit offenders to participate in outside work programs. Medium facilities permit offenders to participate in work-related programs within the confines of the institution. Secure facilities "emphasize control" and provide close monitoring and supervision of offenders who are considered a high risk to re-offend. Some facilities are multi-level in that they contain units with different levels of security.

336 Mr. Stellingwerff described various job skills that can be acquired through educational programs. There are also adult basic education programs and high school courses, permitting offenders to progress to high school graduation. Rehabilitative programs deal with such areas as substance abuse management, violence prevention, cognitive skills and personal development.

337 Federal facilities have similar minimum, medium and maximum security classifications, to which offenders are assigned based on an actuarial tool that assesses their risk and security needs. The needs of the offender, including the availability of family support, are taken into account when assigning the specific institution. Once placed in an appropriate institution they are assigned to rehabilitative programs within an overall integrated program model. These programs are either high or moderate intensity, depending on the identified needs of the person. In either case there is ongoing maintenance after the programs are completed, which carries on into the community upon release. There are adapted programs for those who have barriers to participation, such as learning disabilities. An institutional parole officer determines what programs would be beneficial for rehabilitation.

338 As to the programs themselves, Mr. Stellingwerff described "a vast array" in the federal system, including educational upgrading to the secondary level and higher, vocational and trades training. There are also programs to assist in the offender's transition to the community.

VII. POSITIONS

A. The Crown³

1. Youth vs. Adult Sentences

a. General principles

339 The Crown's summary of the principles that guide the determination of a youth or adult sentencing generally conforms with the summary I have provided, so I will only refer to significant additional points raised and areas of particular emphasis by Crown counsel.

340 Crown counsel did not have the benefit of the *Chol* decision when they prepared their initial submissions, so their endorsement of the requirement to deal with each subsection of s. 72(1) separately, despite the overlap of some factors between them, was based on authority to the same effect from other provinces.

341 As a key example of those overlaps, the Crown explains that the seriousness of the offence and the

circumstances of the young person are relevant both to the rebutting of the presumption of lesser moral blameworthiness and to the issue of accountability.

342 On the issue of the impact of an offender's cognitive limitations, the Crown cited *R. v. Okemow*, [2017 MBCA 59](#), which explained that if there is cogent evidence of such limitations and an informed decision can be made about the relationship between them and the offender's criminal conduct, the sentencing judge must take them into account when deciding the offender's degree of responsibility for the offence. However, *Okemow* also emphasizes that adult sentences have been given to youths with such difficulties in cases of serious violent crimes "where the facts warrant it".

343 A practical example of this approach was provided in *R. v. B.L.*, [2013 MBOB 89](#). Although the offender in that case had cognitive limitations, his life experiences suggested that he had the moral capacity of an adult. He was found to have desired a criminal lifestyle, "known right from wrong" but chosen the latter, and ignored society's norms despite having been warned by his family and the courts of the consequences.

344 The impact of those limitations, as well of the offender having immigrated to Canada with his family and encountered challenges in the school system, can also be outweighed by the seriousness of the offence and the offender's role in it: *R. v. Massaquoi*, [2012 BCPC 113](#).

345 A crucial point made by the Crown is that a youth does not have to be "exceptionally mature" to receive an adult sentence and should not be measured against a fully functioning middle-aged adult without a criminal record. The comparator is rather the average 18-year-old adult offender, who receives no benefit from the presumption. To set the bar any higher would be to frustrate the intention of Parliament, which clearly intended that the presumption could be rebutted in some cases. The Crown submits that s. 72 is in fact an important safety valve to protect the public, even though the generally more lenient youth regime will be applicable to most young people.

346 On the question of accountability under s. 72(1)(b), the Crown adds that a consideration of the normative character of the offender's conduct in the moral blameworthiness analysis necessarily requires a consideration of societal values, specifically the members of the community in which the crime was committed: *R. v. W.D.D.*, [\[2013\] B.C.J. No. 3184](#). (18 October 2013), Surrey 18319-2C (B.C.P.C.), at para. 11. The sentence should ensure that the youth criminal justice system commands the respect of society: *B.L.* at para. 82 citing, *R. v. J.S.R.*, [2012 ONCA 568](#), leave to appeal to S.C.C. ref'd, [\[2012\] S.C.C.A. No. 456](#). In the Crown's submission, this requires a consideration of the effect of the crime in this case on the communities involved, not just in Whistler but Burnaby and Vancouver as well, where many of those affected by it live.

347 In what I took to be a further means of demonstrating the inability of even a youth sentence of maximum length to hold Mr. D. and Mr. R. accountable, the Crown has cited adult sentencing cases which demonstrate the "near-murder" end of the manslaughter sentencing spectrum, which is said to apply to them. These kinds of manslaughters have resulted in double digit periods of incarceration, even after guilty pleas and even when they involved an offender who had no previous record (*R. v. Wall*, [2010 BCSC 972](#)), or a youth who was being sentenced as an adult (*R. v. Kenworthy*, [2009 BCCA 197](#)).

348 Importantly for the Crown's argument, in *R. v. Nguyen*, [2008 BCCA 252](#), the Court emphasized that even though it was appropriate to distinguish to some degree between offenders in a group attack who used weapons and those who did not, "[t]hose who choose to participate in gang-like violence cannot expect to have their culpability determined without regard to the totality of the harm inflicted. Each is accountable for the collective action" (para. 36). The Court also took notice of the increase in swarming

attacks and the need to strongly denounce and deter them. In that case a youth sentenced as an adult, who had become involved in the attack on an unplanned basis, had only punched the victim and did not know his co-accused had weapons, still had his sentence for aggravated assault (the victim was rendered a quadriplegic by the attack) and possession of a weapon increased to twenty months of actual imprisonment, from a conditional sentence imposed at trial.

349 Another relevant point of comparison raised by the Crown in relation to that series of offenders was that one of those who had used a weapon refused to discuss the case with the professionals who were preparing reports for sentencing and insisted that he had not been involved. The lack of an explanation, the absence of remorse and the lack of insight into his behavior diminished his prospects of rehabilitation and impaired the assessment of his future risk: *R. v. Quintana*, [2009 BCCA 119](#) at paras. 54 and 57.

350 Similarly, the Crown cited authority for the proposition that there is no room to draw fine distinctions between group assaulters who had all engaged in roughly the same violent activity towards the victim at the same time: *R. v. Nikkel*, [2001 BCCA 745](#); *R. v. MacIntyre*, [1992 ABCA 319](#).

351 In *R. v. Kim*, [2013 BCSC 2143](#), the Court imposed an effective sentence of seven years on an offender who, as a 19-year-old, had become involved in a drunken melee with another group in a parking lot, during which a member of the offender's party retrieved a gun from the offender's car and shot the victim, killing him. The offender had absconded for seven years and was not sentenced until he was 29. Justice Ker identified a range of sentence of six to eight years for youthful offenders who were involved in an offence in which a weapon was used in a retaliatory or misconceived defensive manner, in circumstances where planning and foresight are limited and fueled by alcohol, and in the dynamics of a "mob mentality and intoxicated bravado".

352 In *R. v. Plowman*, [2015 BCCA 423](#), a swarming involving three or four (and perhaps additional) participants had been carried out in less than a minute. The victim was fatally stabbed during it but that injury was not noticed until after the attackers had fled. No motive for the attack was established, no knife was found and it was impossible to say who had done the stabbing or at what point in the attack it had occurred. Despite the lack of evidence of planning, the sentencing judge found that there had been a real attempt to hurt the victim once the attack began. The judge also found that the offenders knew each other and were acting in concert to overcome the victim's resistance. Aggravating factors were the nature of the attack as a swarming and the fact that it represented a vicious, unprovoked attack in a public place. Importantly for the Crown's submission here, the judge found everyone involved to be equally blameworthy and imposed sentences of differing lengths (seven years for two of the offenders and five years for the third) only on the basis of the difference in their ages and past criminal histories.

353 Their sentences were upheld on appeal, even without any evidence of planning and on the basis that none of the offenders was the knife wielder and that they could not be proven to have known about the knife being used. The Court of Appeal rejected the argument that they had received disproportionate sentences relative to their actual degree of moral culpability of the offenders - agreeing with the trial judge that they were equally morally culpable in those circumstances.

354 Helpfully for our purposes the Court cited the list of more specific factors in assessing moral culpability from the Supreme Court of Canada's decision in *R. v. Stone*, [\[1999\] 2 S.C.R. 290](#) at para. 247, which considered:

...the choice of weapon used to effect the unlawful act, the degree of force the offender used in perpetrating the act, the extent of the victim's injuries, the degree of violence or brutality, the existence of any additional gratuitous violence, the degree of deliberation involved in the act, the

extent to which the act reflected forethought of action or planning, the complexity of the act, what, if anything, provoked the act, the time taken to perpetrate the act and the element of chance involved in the resulting death.

b. A.S.D.

355 The Crown's summary of the relevant circumstances of the offence is similarly consistent with the one I have provided, again with certain areas of greater emphasis that are worth mentioning.

356 The Crown says that the only inference available from the crowd that gathered at the offenders' townhouse is that Mr. Golic had recruited this large attacking group while Mr. D. and Mr. Z. were with the young women in the downstairs area. This is the first available evidence of the planned nature of the attack. They point out that I rejected Mr. D.'s evidence about his innocent purpose in joining the group and that its subsequent actions show clearly that its collective purpose was to find Mr. Gordic and attack him.

357 The observations of the scene witness about the group spotting Mr. Gordic at Marketplace and gaining speed as they approached him is informative about the group's purpose. Mr. Z.'s flashing and producing the knife in the video, aside from showing his own intentions, is said to be circumstantial evidence of what the other group members "planned and intended", given the unlikelihood that such a plan would have been discussed only between Mr. Z. and Mr. Golic.

358 The 7-Eleven video, the circumstances of the arrest and the DNA and forensic evidence also show that Mr. D. and Mr. R. were part of the initial attacking group, along with Mr. Z. and Mr. Golic.

359 Crown counsel submits that these circumstances are at the most severe end of the spectrum. An important aggravating factor with respect to their seriousness was the "planned and premeditated" nature of the attack. Whatever Mr. D.'s motive for participating may have been, it cannot conceivably lessen the offence's seriousness. The Court of Appeal in the cases of *Plowman* and its companion *R. v. Miazga*, [2014 BCCA 312](#) (involving another participant in the same attack) have made it clear how seriously swarming offences, which involve mass attacks on defenceless and outnumbered victims, should be viewed. Vitally from the Crown's perspective, the substantial sentences imposed in those cases (albeit on adult offenders) were justified even though there was no evidence of the kind of advance planning that we have here - a substantial aggravating factor.

360 Mr. D. was three months from being subject to the adult sentencing regime when he committed this offence. The Crown regards the *Pratt* decision as standing for a "sliding scale" approach, in which the presumption of diminished moral culpability has less impact the closer the offender was to 18 at the time of the offence.

361 As further relevant factors, the Crown refers to: Mr. D.'s failing grades and increased truancy; his negative interactions with other students (that "need to be known and feared but also be seen as doing well"); his substantial ego, his grandiose self-personation, including defensiveness and a need to show himself in a positive light; and his significant focus on money as a motivator.

362 While his risk factor for future violence was found by Dr. Steiger to be low, it is contingent on limiting his future exposure to antisocial peers. The Crown submits that his re-association with such negative influences is highly likely, given that it was the lifestyle that he pursued in late adolescence.

363 On the question of maturity, Crown counsel argues that this was far from being a spontaneous,

compulsive act - it was planned and then implemented as planned, even if the death of Mr. Gordic was not foreseeable. The offenders' immediate attack on a helpless victim had no "preliminaries" that would suggest provocation or spontaneity. I am asked to conclude that Mr. D. and his companions had ample time to reflect on what they would do and made a conscious choice to pursue what turned out to be a fatal attack.

364 On that point, I should consider that some members of the group ultimately chose not to pursue the attack. Further, even if there is an intrinsic level of immaturity in a cowardly attack of this nature, the *Plowman/Miazga* cases show that adults are fully capable of engaging in the same behaviour.

365 I should also consider Dr. Steiger's reference to evidence suggesting that Mr. D. was functioning at an average or above average level of social maturity for his age. Interestingly, several of his reference letters praise his maturity as well.

366 Identifying him as a "follower" is not determinative of his maturity at the time - there is nothing intrinsically less mature in taking such a role, which is numerically the far more common one in all aspects of life, the Crown points out. In fact, the evidence surrounding the offence - especially his role in looking for Mr. Gordic and his flight from the offence - shows that he actually took a leadership role in it, aware from the point that he left the townhouse what the group's purpose was. In that regard, findings by the experts of personal characteristics that would have rendered him more susceptible to impulsivity, such as his narcissism, are not very helpful because the offence, properly understood, was not an impulsive one.

367 The Crown rejects the suggestion that Mr. D. has matured through this process from a juvenile way of thinking that drove an essentially spontaneous involvement in this matter, or that his expressions of remorse and sympathy for the victim should be taken at face value. As I have summarized, they say that factual underpinning for such a claim of spontaneous involvement are demonstrably false when one considers the findings about the offence that I made in the trial. In addition, the expressions of remorse and sympathy by Mr. D. were "formulaic, rote and unconvincing". What emerges instead is a self-absorbed young man with a high sense of entitlement, who accepts no responsibility for his actions.

368 Specifically, the Crown says that Mr. D. simply repeats the account of the event that I rejected as false, putting himself even further away from the offence than in his trial evidence. He adds a further exculpatory point about his untied bootlaces, which seems to be contradicted by some of the photographs of those boots when they were seized by the police. Such a claim also ignores the point that his boot would not have gone flying off if it had made contact with Mr. Gordic, as I inferred had likely occurred. He repeats the suggestion, rejected at trial and which the Crown characterizes as absurd, that the police allowed his boots to become contaminated by putting him on the ground beside the blood-soaked Mr. Z.

369 His sole regret as expressed in the reports - that because he was intoxicated he did not "pick up on the situation" and intervene to stop it - is characterized as "particularly unctuous, self-serving and character-revealing". The Crown says it is an attempt to turn his feigned obliviousness about what was happening that night into a virtue.

370 While maintaining that this event has helped him grow as a person, without explaining how that occurred, Mr. D. mainly focuses on his sense of aggrievement for having been wrongfully convicted and the harassment he has received from Mr. Gordic's family and friends. While conceding that the harassment cannot be condoned, the Crown says the point is that he makes it "all about him".

371 His comments about the incident being a "waste" and "pointless" are clinical and personally distant

and he returns to the claim that the incident was a turning point that helped him grow as a person, while appearing to be concerned mainly that a conviction will affect his ability to travel and earn money.

372 In addition, there are some factual inconsistencies in the reports that the Crown submits should give me pause - most importantly, telling Dr. Steiger that he did not see Mr. Gordic being stabbed but then explaining that he had calmed himself down later he when was in custody at the police station with the thought that Mr. Gordic "was only hurt in the arm", something that he could not have known at that point unless he had seen it.

373 All in all, the Crown says the continuation of Mr. D.'s exculpatory lies is revealing of his character and shows that in the context of the seriousness of the offence, a youth sentence is inadequate to serve the ends of justice.

374 Lastly in terms of factors justifying an adult sentence for Mr. D., a sentence of more than two years would place him under the federal parole regime upon his release with the possibility of suspension and return to custody in the event of any non-compliance, in contrast to the less robust community supervision portion of a youth sentence. The motivation provided by the consequences of a parole breach is essential, in the Crown's submission, so that Mr. D. makes efforts to be a law-abiding citizen. And prior to that stage, the requirement that he make efforts to earn earlier release by pursuing rehabilitative activities makes a longer sentence, perhaps counterintuitively at first blush, more conducive to his rehabilitation.

c. G.C.A.R.

375 The general structure of the Crown's submissions and many of the submissions on Mr. R.'s degree of participation and moral culpability for the offence were the same as for Mr. D., so I will not repeat them.

376 Relevant observations by the Crown about Mr. R.'s background relate to his friendship with a youth who was believed to be gang-connected and his need to transfer schools because he was not safe at his original school and had to get away from negative peers. Concerns about a peer group with gang connections in the South Vancouver area were expressed by the school liaison officer at the school to which he transferred.

377 His response is that he socialized and would smoke marijuana with these people but was not involved in any gang activity. In the Crown's view his excuses for these associations resonate with his unbelievable claim in this case - that he has been falsely accused and was only an innocent bystander, on the periphery of more serious activity by others.

378 A theme of being self-centred or even narcissistic emerged in Mr. R.'s interactions with the report writers, such as: invalidating the results of a test by rushing through the answers because he was hungry and wanted to get something to eat; expressing to a counsellor to whom he had been referred while he was on bail that he was most concerned with having to abide by a curfew and not associate with certain friends; and expressing to the writer of one of the reports that he wanted to have a muscular profile so he could take his shirt off and be the centre of attention.

379 It is impossible for Mr. R.'s professions of remorse to be taken as genuine when they do not involve an acceptance of his proven conduct - the Crown describes his position as "doublespeak in the fullest sense". There is similarly no basis on which to assess Mr. R.'s level of insight into his behaviour, because he maintains that he did not participate in the offence.

380 On the question of how much weight to give their reports, it is notable that while Dr. Bartel and Dr.

Stevenson found him credible when assessing his description of the extent of his involvement, his evidence at trial was disbelieved. More generally, the entire defence theory of why Mr. R. should be dealt with in the youth system are at odds with the facts established in the trial.

381 The extent of his remorse extends to having been part of a group that targeted Mr. Gordic, not being more "intuitive" and not asking more questions. This position runs afoul of the unlikelihood that I found of Mr. Golic's anger going unnoticed and the evidence of the search for Mr. Gordic by the group, which Mr. R. must have been aware of and knowingly joined. Given the large number of group members, the failure of any witnesses to identify him within it during the search for Mr. Gordic is not significant - he and numerous other group members were strangers to the friends of Mr. Gordic who encountered them.

382 The evidence of one of the scene witnesses of the attacking group sighting and then targeting Mr. Gordic, speed walking before breaking into a run to the attack, raises a question of when exactly someone would be able to join the attacking group spontaneously. The fact that he brought and opened the knife before leaving it at the scene of the attack also belies any portrayal of spontaneity. In other words, Mr. R.'s excuses are misleading as to the nature of the attack, which he could not have joined in without knowing its object, in light of the actions that preceded it. It was not the kind of spontaneous, thoughtless violence that the experts speak of teens being susceptible to.

383 Further, I am asked to consider the relatively sophisticated nature of Mr. R.'s rejected evidence, in which he relied on the attack scene video to support his claim that he was a non-combatant and enlisted his co-accused to testify falsely about his handling of the knife earlier in the day.

384 Summarising the relevant factors under s. 72, the Crown submits that Mr. R.'s presumption of reduced moral blameworthiness is rebutted by the circumstances and seriousness of this offence; the amount of additional planning and deliberation involved in bringing a knife to an already planned attack and joining the attack after he dropped it; his post-offence conduct of discarding the knife and running from the scene, (showing that he "knew right from wrong" and which supported the inference that the purpose for which he and the other attackers had assembled had been completed); his functioning at an average and appropriate intellectual level for his age and his demonstration to the report writers of his maturity; the absence of any coercion, family problems or psychiatric disorders that could serve to reduce his moral blameworthiness; and his repeated choices to associate himself with negative peer groups, not through a lack of moral judgment but as "a deliberate decision to defy social norms".

385 Interestingly from the Crown's perspective, his counsel's emphasis on what a "pro-social and non-criminal" youth Mr. R. was before this incident ends up highlighting Mr. R.'s maturity for his age. This is in keeping with Dr. Stevenson's description of him as a "mature young man". Finally, as in the case of Mr. D.'s involvement, the offence itself says nothing about a participant's maturity - it is one that is committed by many adults as well.

d. L.Z.

386 The Crown's position that there is a sliding scale of reduced moral culpability as the offender approaches 18 is especially emphatic with Mr. Z., who was so close to his 18th birthday when he committed this offence.

387 With respect to his maturity, they acknowledge that in Dr. Bartel's report he was characterized as "immature and a follower" at the alternative school where he ended up after being expelled from his original school. In contrast the Crown points to the totality of his pre-offence lifestyle, which they submit

reveals "an intelligent, sophisticated and cunning young man, mature beyond his years mentally" despite issues such as ADHD.

388 Two especially telling examples are his ability to set up a relatively sophisticated drug dealing operation, something beyond the capacity of most youths, and his orchestration of his parents to provide alibis for his absence in his breach of recognizance.

389 The history revealed through the interviews shows that he was "entrenched in a criminal lifestyle" for the entirety of his teens, including frequent robberies involving the display of weapons and having once "shot at someone". The Crown says he presented himself as an "egocentric amoral young man wholly immersed in a violent subculture." While acknowledging the remarkable nature of his candour with respect to his past wrongdoing, the Crown questions whether it actually amounts to bravado being expressed by someone who is still impressed with that way of life. They also contrast this broad disclosure to the ongoing claims to have had no memory of the attack on Mr. Gordic.

390 Commenting on the change in perspective caused by the death of his role model, Mr. Golic's gang-involved uncle, Crown counsel expresses the concern that it was the death of this criminal figure and not the innocent Mr. Gordic that has had the life-changing effect.

391 His ongoing claims of a lack of memory during the preparation and execution of the attack and his flight from it are undermined by his bizarre account of looking Mr. Gordic in the eyes after stabbing him. A claim to this moment of clarity is also add odds with his calm and at times jocular demeanour when he was being dealt with by the police after his arrest.

392 More fundamentally, the entire account of his role in the offence on which the experts, particularly Dr. Ley, based their opinions, was rejected by me in the trial, especially his claimed lack of memory. It is difficult to see, says the Crown, how an "identity crisis" that did not lead Mr. Z. to describe his involvement in the murder accurately can be the foundation of a true change in character, as Dr. Ley has suggested.

393 In the Crown's view the experts do not lack competence, they simply do not have the knowledge base that the court has with which to refute Mr. Z.'s account of the relevant events. Both the circumstances of the offence and the representations about his changed behaviour are based on self-reporting, and Dr. Ley explicitly disavows having any role in assessing credibility. (His descriptions of Mr. Z. also suggest that he was quite charmed by him in their interactions.) Characterizations of the murder as anything other than a focused and targeted effort are contradicted by the fact that the three stab wounds, including the fatal and potentially fatal ones, all occurred within the total 17-second duration of the group attack. This proven degree of involvement is contrary to the impulsive, drunken act that he has persuaded the report writers to accept, especially in light of the failure of his intoxication defence.

394 Being the person who inflicted the stab wounds, he has the highest degree of participation in the offence - his moral culpability, in the Crown's submission, is complete. The harm he caused was both intentional and foreseeable. Particularly aggravating features include Mr. Gordic's defenceless state when he was attacked and the absence of any provocation or justification for the attack.

395 An additional concern is that his claimed reformation - both his abstinence and his new understanding of the wrongfulness of his past acts - must have occurred without his having yet engaged in any therapy or treatment. Such an outcome seems highly unlikely.

396 Interestingly, Mr. Z. provided Dr. Stevenson with quite a thorough list of the factors that he believes

should mitigate his sentence, all of which are in fact relevant to that determination. The Crown suggests that this shows a sophisticated understanding of and willingness to provide the answers that will most benefit his cause.

397 The Crown provided examples of youths who received adult sentences for second degree murder based on concerns that they submit are usefully comparable to Mr. Z.'s situation, such as:

- * the extent of the risk to reoffend and the inadequacy of a youth sentence to reflect the offence's seriousness and the offender's role in it: *R. v. Logan*, [2009 ONCA 402](#);
- * the youth's awareness of the consequences of his fatal actions before undertaking them, despite fresh evidence on appeal that he was suffering from FASD (fetal alcohol spectrum disorder): *R. v. Manitowabi*, [2014 ONCA 301](#);
- * an attack on a confined, defenceless victim and the offender's gang membership and extensive drug dealing activity: *R. v. Estacio*, [2010 ABCA 69](#);
- * entrenchment in a life of crime and a high risk to reoffend, despite a sympathetic background of parental abuse and time in foster care: *R. v. J.T.S.*, [2007 SKCA 84](#); and
- * gang membership, the luring of the victim to the point of his murder and increasing antisocial behaviour, showing little capacity for rehabilitation: *R. v. I.C.*, [2010 ONSC 3359](#).

398 The Crown also provided some examples of youths sentenced as adults for first degree murder, but in the absence of any particularly helpful comments in those decisions about assessing the maturity level of the offenders under the first component of s. 72, the inherently greater moral culpability of that offence diminishes their usefulness as comparators.

399 Summarizing the crucial aspects of Mr. Z.'s moral blameworthiness, the Crown stresses that the degree of disregard of the sanctity of human life reflected by his actions is "beyond comprehension". He did not just create the risk of serious harm by his actions, it was virtually certain that Mr. Gordic's death would result from them. Nothing less than an adult sentence is capable of meeting the requirement of accountability as a result.

400 As in the case of the other two offenders, Crown counsel contrasted the level of monitoring that is available under a federal sentence, in this case of life imprisonment, with the opportunity of a swift return to custody in the event that he breaches his conditions or otherwise fails to pursue his rehabilitation, with the time-limited nature of the maximum supervision component of a youth sentence for second degree murder.

2. Length of Sentences

a. A.S.D. and G.C.A.R.

401 The Crown dealt with these offenders together in their main submissions on the question of the length of sentence to be imposed. This was helpful given the number of common features of their backgrounds and their degree of involvement in the offence.

402 If I accede to the Crown's submission that they be sentenced as adults, the Crown says that a range of

sentence of four to six years is appropriate. Mr. D. should receive a sentence towards the lower end of that range and Mr. R. should receive one towards the higher end.

403 The Crown recognizes that even if an adult sentence is imposed, s. 3 *YCJA* principles continue to apply (*Pratt* at para. 55), but not s. 38, which applies only to a youth sentence (*Nguyen* at para. 34).

404 Despite the continuing operation of these principles, it is stressed that they in no way inhibit the imposition of sentences in the range that is being sought. Section 3 has as its premise that the youth system must protect the public by holding youth accountable, through measures that are proportionate to the seriousness of the offence and their degree of responsibility.

405 Mr. Golic received a sentence of seven years for manslaughter as an adult. There were obvious aggravating factors in his case - he was an adult, although "barely" one as the sentencing judge noted; he was the driving force behind the assault; and he had a serious and related record of two convictions involving the use of knives.

406 The Crown developed a submission that in fact, his sentence should have been higher, and correspondingly the sentences being sought for the current manslaughter offenders can be supported. This is based on the alleged failure of the sentencing judge in Mr. Golic's case to consider an element of our circumstances that distinguishes it from the comparator *Plowman/Miazga* cases - the presence of planning.

407 They sought to illustrate the importance of planning through Court of Appeal manslaughter sentencing decisions that explicitly make its presence, in contrast to incidents of spontaneous fatal violence, the basis for substantial increases in the length of sentences (*R. v. Gillies* (1998), [107 B.C.A.C. 157](#); *R. v. Tran*, [1999 BCCA 367](#)).

408 This is why, the Crown explains, there are relatively few manslaughter cases in which adult sentences are imposed - most lack the element of planning, more characteristic of murders, that feature so prominently in our case. In the usual case manslaughter may reflect the "juvenile" qualities of short-sightedness and disorganized thinking, but that is not invariable.

409 Participation in the planning by Mr. D. and Mr. R. is shown by: their inevitable awareness of Mr. Golic's anger towards Mr. Gordic; the likelihood that Mr. R. was recruited into the group while Mr. D. and Mr. Z. were occupied with the young women; Mr. D.'s involvement as a questioner concerning Mr. Gordic's location when the group was searching the village; and Mr. R. producing and then abandoning the knife at the attack scene, which suggests prior knowledge of what was planned.

410 The circumstances of the actual attack are also important in this regard, such as the statement about having located Mr. Gordic that was made by one of the attackers, likely Mr. Golic (I could not be satisfied it was Mr. Z.), the manner in which the attackers were described approaching Mr. Gordic once they had apparently sighted their target at Marketplace, and the way the video evidence shows their "relentless and fixed purpose".

411 Most importantly, the Crown asks me to go beyond the finding of fact at the trial that Mr. D. and Mr. R. participated in the attack to the extent supported by the forensic evidence and make the further finding that, of the initial five attackers, they were attackers number 3, 4 or 5 (Mr. Golic and Mr. Z. being the first two).

412 In a resourceful analysis, Crown counsel asks me to infer from:

- * my rejection of Mr. R.'s evidence that he was participant 6;
- * my rejection of Mr. D.'s claim to have been a group member shown in the video who never actually entered the attack scene; and
- * my finding that the seventh through ninth participants to join the attack returned in the direction from which they had come (towards Marketplace), with the others exiting in the other direction towards Main Street,

that Mr. D. and Mr. R. must have been members of the initial group, which most aggressively and directly pursued the attack.

413 My finding that that they and Mr. Z. are the three attackers seen together in the 7-Eleven video is further evidence of their connection when leaving the scene.

414 All of this is in support of a finding that there was a sufficiently close relationship between all three offenders and Mr. Golic that they readily acquiesced in his violent and vengeful purpose, even though Mr. D. and Mr. Z. apparently still had plans to continue their liaisons with the young women later. The even more important finding that the Crown says follows is that Mr. D. and Mr. R. assumed a risk that significant harm would be inflicted when they joined the group. The Crown stressed that this is not an attempt to fix them with knowledge that there was going to be a stabbing. It is simply that they should bear some responsibility for the consequences, based on their voluntary assumption of risk that someone involved in the group attack would do something more serious.

415 Another way of orienting Mr. D. and Mr. R. within the range of adult sentences based on Mr. Golic's sentence is to note that he was found in his trial to have been the instigator of the attack, as he was in this trial, but the attack itself was repeatedly characterized by the judge as a joint effort within which he was not the driving force. Because Mr. D. and Mr. R. freely chose to participate in the attack, its circumstances should be as fully applicable to them as an aggravating factor as they were to Mr. Golic. Participating in an assault in numbers that are intended to render the victim incapable of defending himself is an "egregious" circumstance, the Crown submits.

416 While it could be said that Mr. D. and Mr. R. had secondary roles in comparison to Mr. Z.'s, by no means can they be considered minor in the overall offence. In fact it could be argued that by bringing and opening a knife Mr. R. played a more aggravated role than Mr. Golic, who initiated the entire attack.

417 A helpful means of assessing the adequacy of a youth sentence for this degree of participation is provided, in the Crown's submission, by the youth sentence for manslaughter in *R. v. P.C.*, [2013 ONSC 1293](#). The offender there was 15 years old who was convicted of manslaughter for his role in the death of a youthful victim from a beating largely administered by an adult co-accused. The offender was a pathetic individual and somewhat of a follower who had played a role by getting the victim out of a bar and into a vehicle, being present at park where the victim was beaten and then assisting in transporting him to the principal adult offender's home, where he died of his injuries. The offender felt he had been used by his co-accused. He did not express any sense of responsibility for the death. Despite his age, lack of prior record and adherence to his bail conditions, a period of custody was still needed, in the sentencing judge's view, to instil the required degree of insight into his actions. With credit for time served he received an

effective sentence of custody of two and a half years. After allowing for pre-trial custody the custodial portion of the sentence was 10 months and the conditional supervision period was for eight.

418 Other sentence-aggravating features relied on by the Crown to justify sentences in that range are:

- * the inherent nature of the attack as a group assault or swarming, in which the victim was rendered helpless by blows from multiple participants;
- * the fairly close proximity of Mr. D. and Mr. R. to the threshold of an adult sentences (which the Crown had relied on in the previous context of rebutting the presumption with respect to their moral blameworthiness); and
- * their efforts to deceive the court with their evidence that the knife was handled by multiple residents of the townhouse earlier that day.

419 A specific aggravating trial finding with respect to Mr. R. is that the forensic evidence on the scene knife showed not only his possession of it at the scene of the attack but also "the performance of some operation of the knife consistent with its purpose." Combined with my finding that Mr. R.'s finger injury was a further small piece of evidence showing recent manual handling of the knife, the Crown says I should find that he produced the knife, cut his finger, dropped it and abandoned it at the scene. This reveals the actual nature of his thwarted plans and the extent of his leadership in the attack.

420 Even though he is the least culpable of the four identified participants in the attack, Crown counsel says that Mr. D.'s culpability is still significant - he quickly abandoned his other plans that evening to inflict violence in a matter that was not his own grievance, assuming a leadership role in locating Mr. Gordic and then being part of the most aggressive wave of attackers.

421 To impose no jail at all on these offenders, as they seek, would fail to hold them accountable for a role in a planned and violent offence that has caused so much "havoc". As the Crown put it "there have to be meaningful consequences for choices made and acted on." It cannot seriously be argued that their proposed dispositions are meaningful in that sense.

422 If I am still not satisfied that adult sentences should be imposed, Crown counsel asks that I allocate the entire maximum three-year period available under s. 42 to the custody portion, to properly reflect the most pressing sentencing objectives in this case. They reason by analogy from previous *YCJA* cases in which the allocation of one or no days to the custody portion, with the rest as conditional supervision, have been held to be valid exercises of the youth court judge's discretion: *R. v. B.W.P.*, [2004 MBCA 110](#), aff'd [2006 SCC 27](#); *R. v. C.L.K.*, [2009 MBQB 227](#).

423 Finally, considering the cases put forward on behalf of Mr. D. and Mr. R., the Crown submits that fact situations that bear no resemblance to this one, such as consensual fights gone wrong, spontaneous drunken melees and unexpectedly fatal blows - are not helpful in identifying an accurate range of sentence.

b. L.Z.

424 The length of Mr. Z.'s sentence will depend on whether he receives a youth or adult sentence. The only additional Crown submission that needs to be referred to with respect to it is their position that in the event of a youth sentence an IRCS order is not justified on the requirements of the section.

B. A.S.D.***1. Youth vs. Adult Sentence***

425 On the question of moral blameworthiness, Mr. D.'s counsel stresses that "offenders who act out of immaturity, impulsiveness, or other ill-considered motivations are not to be dealt with as if they were proceeding with the same degree of insight into their wrongdoing as more mature, reflective, or considered individuals": *K.M.* at para. 15. While young people obviously have a basic understanding of the immediate physical consequences of their actions, they usually lack the fully-developed sense of moral judgment about the appropriateness of those actions that the legislation requires. This diminished level of blameworthiness is applicable to all youths except those who have "essentially matured beyond their years", according to counsel.

426 Immaturity, impulsiveness and ill-considered motivations are apt terms to describe Mr. D.'s actions and those of his companions on the night of the offence, it is argued. Alcohol and drugs were consumed recklessly and there were overtones of "teenagers gone wild". Ultimately a herd mentality prevailed at the townhouse, dominated by "poor choices, bad judgments, react[ive] behaviour and impulsivity".

427 As to the composition of the group at the townhouse, it was a group of high school boys, not a gang of any kind, and many of them were only acquaintances of each other's.

428 Of particular importance, Mr. Golic was older and already out of school and he exerted dominance over Mr. D., whose parents had tried to convince him that it was not a good relationship (Crown counsel responds that this aspect of the relationship between Mr. D. and Mr. Golic was not referred to in the trial evidence). As his mother explained in her letter to the court, he is a follower who would like to see himself as a leader. His counsel pointed out, when distinguishing the case of *B.L.* on which the Crown relied, that wanting to be part of an "in crowd" is not the same as being a gangster, which *B.L.* overtly sought to be.

429 Dr. Singh observed that Mr. D. comes across as emotionally immature and Dr. Steiger's psychological testing found that his intellectual and social emotional state would be that of a normal adolescent, not of an advanced or adult level. His upbringing, in which his family "held him close to home" may have made him even less mature than the average 17-year-old.

430 There were also observations during the interviews for the reports that were indicative of a lower degree of social maturity - limitations in certain aspects of personality functioning and in recognizing or acknowledging some of his limitations. This can lead, according to Dr. Steiger, to stress and anxiety if his defence mechanisms falter. There are also some narcissistic personality traits present. Crucially, in the year leading up to this offence he was "making bad choices, not performing well at school [and] pushing boundaries with his parents".

431 He was fairly described at the time as "a pretty good kid", who had meaningful involvement in sports and community activities. That kind of description should not be confused with being mature however.

432 On the issue of accountability, Mr. D.'s counsel emphasizes that a youth sentence does not hold the offender less accountable, just differently accountable: *D.B.* at para. 93. Achieving the objective of long-term protection of the public means looking beyond the length of the jail term or community supervision that is imposed and focussing on what will be effective "for the balance of the offender's life".

433 When considering the circumstances of the offence, I am asked to keep in mind Mr. D.'s actual intent

in joining the attack, which was likely the same understanding as the planned confrontation with the Gordic group at the Olympic Rings earlier that day - some kind of fistfight. There was no evidence and no available inference of him taking part in a scheme involving the use of a knife, or of any intention on his part to cause death or serious bodily harm. I did not find that he was a planner or an instigator of an attack on Mr. Gordic.

434 His counsel says that with what we now know about his intellectual deficits, it is clear that Mr. D.'s involvement was somewhat of the "classic scenario" in which a youth having problems in school falls in with the wrong crowd looking for reinforcement. His narcissism would have blocked his self-reflection, as it still does to a degree, and his immaturity would have made him more likely to react impulsively, without regard to consequences or empathy. And he would not have had the ability to pull away from the group he needed to impress, headed by Mr. Golic.

435 His struggles in school may be explained by the variations in his intellectual strengths that were revealed in the testing for the reports, which found him to be in the low to low average intellectual range. His counsel suggested his low score in processing speed would be very important when he is making decisions "in the moment", but whatever his challenges may be in that respect an offender does not need to have "serious mental impairment" to have diminished moral capacity.

436 Looking at Mr. D.'s circumstances with an eye to rehabilitation, I should keep in mind his model response to very restrictive bail conditions, his absence of any criminal history or indications of past criminal involvement and his completion of his high school requirements and pursuit of regular employment while this charge has been outstanding.

437 He presents as a low risk on all the potential measurements of likely reoffending. In fact, if he were to be incarcerated with higher-security offenders a primary risk factor that has been identified in the reports for him in terms of reoffending would be his exploitation by antisocial adults. Thus, imprisonment is not in society's best interests, his counsel argues.

438 Mr. D.'s expressions of remorse must be considered in light of the fact that he is appealing his conviction. What he has expressed is appropriate for the limited involvement in this matter that he maintains he had. Significantly, various report writers found him to have insight into the situation.

439 To illustrate the usual outcome in manslaughter cases involving youthful offenders, Mr. D.'s counsel prepared helpful charts illustrating that youth sentences are almost uniformly imposed for that offence. They suggest that this is because it has "the hallmarks of a short-sightedness and disorganized thought [process], which is very juvenile indeed."

2. Length of Sentence

440 If I accede to the submission that Mr. D. should be sentenced as a youth, the defence says that the proper sentence is a custody and supervision order that is apportioned entirely to the conditional supervision portion in the community, as it was in the cases cited by the Crown.

441 The Crown's position that the cases apportioning sentences in that manner also support imposing a period that is allocated entirely to custody are misguided in counsel's view - they are contrary to the spirit of the *YCJA*, which is geared to allowing offenders to either remain in the community, or to have their return to it guided in an effective manner.

442 When considering the cases provided by the Crown, I am asked to keep in mind that most of them

deal with the "primary instigator or the person who inflicted the fatal injury". The secondary role ascribed to Mr. D. in this case should moderate the kind of sentence that they feature.

443 General deterrence is not one of the permissible objectives of a youth sentence and Mr. D. has no proclivity towards future offending, especially violent offending that needs to be specifically deterred by a custodial sentence. More broadly, I should heed the comments in *R. v. B.W.P.* at para. 7 that:

Generally speaking, the *YCJA* emphasizes accountability, rehabilitation and reintegration of the young person into society to contribute to the long-term protection of the public. The *YCJA* directs the youth justice courts to consider alternatives to custodial sentences.

444 These purposes will not be achieved by unnecessarily punitive sentences.

445 The defence has provided some comparable cases involving multiple participants or group assaults to illustrate the appropriate youth sentencing range for consideration:

- * *R. v. A.D.*, [2011 BCSC 501](#): A.D. and a co-accused B.G. both participated in the assault that caused the death of the victim, but A.D. was the offender who is said to be comparable to Mr. D. After a verbal confrontation with two older males, A.D. stomped on the head of a male whom B.G. had just knocked to the ground. That male died but it could not be determined which blow caused his death. (B.G. had previously knocked another male from the opposing group unconscious with a blow.) A.D. was 15 at the time of the offence and 17 at sentencing. He had six prior unrelated convictions and had not done well under community supervision. He had a substance abuse problem and violence and behavioural problems. There was little structure at home and he had endured his mother's PTSD from trauma in his family's country of origin. He received an effective sentence of a three-year custody and supervision order, two-thirds of which was to be served in custody, but given his pre-trial custody it was reduced to a one-year supervision order.
- * *R. v. J.L.*, [2016 ABPC 299](#): This case is said to be even more closely comparable to our circumstances. A fight between two groups of young people had erupted outside a house party. A friend of T.P.'s had been hit with a bottle by the victim and T.P. and another chased the victim, who was knocked to the ground. T.P. straddled him and hit him forcefully numerous times in the head and upper back. T.P. was then pulled off by others and the victim was told to run. He was pursued by two other co-accused, one of whom fatally stabbed him. T.P. was 17 years at the time of the offence. He had no prior criminal record. His family was supportive. He accepted responsibility for his role and expressed remorse. He had plans to pursue a trade and was employed at the time of sentencing. He was sentenced to a custody and supervision order for two years, with one year of custody and one year of community supervision.
- * *R. v. N.A.*, [2018 MBQB 93](#): The victim had attempted to provoke a fight with N.A.'s friend because the friend was now dating the victim's former girlfriend. When the victim confronted the friend, N.A. produced a knife that he had previously obtained in case the victim caused problems and stabbed the victim once, killing him. He later slashed his own arm to make it appear he had been acting in self-defence and persisted in that story with the police for a period of time. He was three months short of his 18th birthday at the time and by the time of the sentencing had completed some university courses online. He was a person of "high intellectual functioning", had a good support system and his reference letters from the community showed the offence to be out of character. He had served nine

months of pre-trial custody and had been on strict bail for two years. The sentencing judge found that because the victim had initiated the confrontation, N.A. was a very low risk to reoffend and denunciation did not require incarceration, a 12-month custody and supervision order, with one day in custody, was an appropriate sentence.

446 The defence says that the Crown's reliance on the decision in *P.C.* is not apt here. That offender's role in the offence was much greater than Mr. D.'s and the incident occurred over a significant period of time, in three different locations, including moving the victim while he was still alive to cover up the crime. While the result in our case was terrible, the assault occurred very quickly, after which the participants "fled like lemmings" rather than remaining and landing repeated blows.

447 If an adult sentence is imposed, counsel sought the imposition of a conditional sentence. (That is now precluded by legislation, as I have described, so I will treat this as a submission in support of a non-custodial sentence by the remaining available procedural vehicle of a suspended sentence.)

448 It is well known that sentences for manslaughter range from a suspended sentence to life imprisonment. It is the nature of the unlawful act underlying the offence that is most influential on the question of moral blameworthiness. Here I should keep in mind once again Mr. D.'s secondary role in the offence.

449 On this issue, it is not clear that the only purpose of the group in travelling around the village was to locate Mr. Gordic - "there is nothing to say that they did not merely wander[...] around it", with "all or some of them" looking for him. For Mr. D.'s part, it was his first time in Whistler, which should lend plausibility to that alternative. However, counsel mistakenly referred to the inconclusive relationship between evidence of his inquiries about Mr. Gordic's whereabouts *the day before* the Olympic Rings incident on his intention *the next night*. The evidence I accepted was that his inquiry to Mr. Gordic's three friends near Marketplace was earlier on the same evening as the attack.

450 Bearing in mind that the case authorities for adult manslaughter sentences imposed on youths are limited, two cases cited by the defence show that relatively moderate sentences (18 months and two years less a day), well below those being sought by the Crown, were imposed for very brutal and aggravated circumstances, involving multiple blows using weapons having been inflicted by the offenders in question: *R. v. D.D.V.*, [2005 BCCA 396](#) and *R. v. K.D.T.*, [2006 BCCA 60](#). (The Crown points out that the effective sentence in *D.D.V.* once pre-trial custody was credited was actually in the range of 40 to 51 months. I take counsel's point however that the circumstances of these cases were much more serious than Mr. D.'s actions.)

451 In the same way, the sheer amount of violence (19 stab wounds inflicted, after the offender had in some way provoked a confrontation with the victim), fuelled by alcohol and drugs, that was required to justify a sentence of seven years on the 17-year-old sentenced as an adult in *Gillies* should give a clear idea of how far below that kind of range Mr. D. falls.

452 With the appropriate discount for the fact that he was 19 at the time, the 16.5-month period of imprisonment for the offender in *R. v. Sinclair*, [2012 MBCA 24](#), is also said by the defence to be instructive on an appropriate sentence for Mr. D. That offender had been one of three participants in a vicious assault of a victim, after which they left him lying in the street, where he was fatally run over by a passing motorist. (The Crown notes that the offender was actually being re-sentenced after an appeal of the case to the Supreme Court of Canada, having turned his life around in the interim, and had originally received a sentence of six years.)

453 The reasons for sentencing on Mr. Golic are not especially applicable here, Mr. D.'s counsel submits, given the difference in Mr. Golic's criminal background, demonstrated character and role in the death of Mr. Gordic. Its only value is in contrast to Mr. D.'s many positive factors and much more limited role.

454 Finally, Mr. D.'s counsel submits that this is a case in which the threats and harassment to which he has been subjected since the offence by unknown individuals allied to Mr. Gordic's cause, as set out in the pre-sentence report, meet the definition of "collateral consequences" as defined by the Supreme Court of Canada in *R. v. Suter*, [2018 SCC 34](#), thereby justifying the imposition of a sentence below the usual range.

C. G.C.A.R.

1. Youth vs. Adult Sentence

455 Mr. R.'s counsel submits that the extensive reports make it clear that Mr. R. was "an ordinary boy caught up in extraordinary events" - a non-criminal youth before this incident who has been stable, compliant and hard-working since. There is simply no way he would have been able to fool these experts, or the extensive collateral sources they drew on for their reports. Counsel rejects as unfounded the Crown's attacks on the reports' conclusions, pointing out that the experts prepared the reports on behalf of the court and are well-qualified to do so.

456 All that the reasons for judgment determined was that he was "somehow" a part of the group that attacked Mr. Gordic. He was not identified as a leader "or even an aggressor". He did not know Mr. Gordic but did know the "older more assertive Mr. Golic" and his psychological profile is that of a follower. Dr. Gangopadhyay's testing showed him to be someone who is "somewhat socially anxious, insecure and dependent on his social relationships", with a tendency "to submit to the wishes of more assertive peers at the expense of his own desires". This makes it very likely that he participated in the attack in order to "win the favour of peers he was attracted to".

457 His counsel submits that the Crown is mistaken in seeking to support its application with an alleged lack of remorse on Mr. R.'s part. Within the confines of the facts he accepts, he has made repeated sincere expressions of regret for the poor judgment he exercised that night, in terms of his actions and associations, and of sympathy for the horrific impact of what occurred on Mr. Gordic and his family. For example, his comments in the pre-sentence report that "he accepts the verdict" and that "he has not gone a day without thinking about the victim". To the extent that such a matter can be assessed externally, Dr. Stevenson found that these expressions appear to be genuine.

458 Also vital to consider are the low risk for future violence that has been identified and the finding that the behaviour was out of character.

459 Dealing with the presumption of diminished moral blameworthiness, the defence points out that Mr. R. had just turned 17 at the time of the offence and had previously done well in school, sports and outside employment, before going on a "negative trajectory" and becoming dependent on antisocial peer groups for validation.

460 It is fair to say that he was "afflicted with a certain level of naivety" during the weekend of the offence, according to his counsel. Dr. Gangopadhyay's observations that he was "caught up with the 'mob mentality' of the group" and "was displaying the diminished culpability assumed of young people" are put forward as explicit confirmation of this defence submission. In addition to his susceptibility to peer pressure, the role of his alcohol and drug consumption must be figured into his behaviour that night.

461 These factors also play a role in the analysis under s. 72(1)(b). His counsel argues that Mr. R.'s role as a secondary player and a follower in the attack means that his moral blameworthiness is not of a degree that requires an adult sentence to hold him accountable. Any need to address the harm caused by swarming attacks through the sentence imposed must be moderated in Mr. R.'s case by the extent of the role that he actually played and his susceptibility to the group dynamics.

462 His excellent prospects for rehabilitation and his limited treatment needs in that regard suggest that his reintegration into society would be better served by a youth sentence. As in Mr. D.'s case, the experts' view is that incarceration would expose Mr. R. to more antisocial and criminalized offenders, and undermine those positive prospects.

463 Mr. R.'s counsel provided an extensive canvass of cases in which more serious circumstances, greater participation in the offence by the offender, less insight and remorse or less positive rehabilitation prospects still led to youth sentences being imposed. He anchored his canvass in the comments of Justice Bowden in *R. v. P.H.*, [2017 BCSC 1105](#) at para. 119 that "even in the case of an egregious murder, a youth sentence has been considered to be fit".

464 As far as it relates to youth sentences for first and second degree murder, I take counsel's essential point, as Bowden J. noted, that such sentences have resulted even where the circumstances of the offence are of the most serious kind. But reviewing such cases does not really advance that essential point when the offence to be sentenced is manslaughter. I also see no benefit in summarizing manslaughter cases involving aggravated circumstances in which the Crown did not seek an adult sentence, since they do not engage the question with which we are concerned and there is no useful consideration in them of the s. 72 factors. They may be relevant to determining the appropriate range of sentence if Mr. R. is sentenced as a youth however.

465 The general principle that emerges from all of the cases cited by Mr. R.'s counsel under this heading is that, as Rowbotham J.A. observed in *J.F.R.*, the circumstances of the offender will lead to differing outcomes in cases where the circumstances of the offences are all very serious.

466 As an example of a youth sentence that was driven by the offender's circumstances despite his participation in quite an aggravated offence, counsel cited *R. v. T.M.*, [2017 BCSC 862](#). The offender had been convicted of manslaughter and offering an indignity to human remains. He had participated in a fatal assault on his uncle with his cousin and his cousin's friend. He had earlier attempted to act as the peacemaker in the dispute that led to the assault. His own role was to kick the victim in the chest and ribs five times, while saying that he hated him. These were not the blows that caused the victim's death. After the victim died, having been attacked in various ways by the cousin that could be described as torture and mutilation, the offender attempted to dig a hole in the back yard to bury him but the ground was too hard. He was 15 at the time of the offence. He had no previous criminal record, and despite serious personal challenges he was excelling in school and gained positive evaluations from everyone who dealt with him, including a description of him from his youth worker as the best youth he had ever worked with. Justice Watchuk was not satisfied by the Crown's submissions on either component of s. 72 and imposed a youth sentence, an IRCS order for three years, with the first five months in custody.

467 Describing the offence and Mr. R.'s circumstances according to the considerations identified by Stromberg-Stein J.A. in *Chol*, his counsel pointed to:

- * Mr. R.'s relative youth;

- * His complete dependence on his parents;
- * His vulnerability to others;
 - * The presence of a sense of false bravado in his actions;
 - * The likelihood of impulsiveness playing a role, given his psychological profile;
 - * Even if the attack as a whole had some element of planning to it, the possibility, which cannot be ruled out on the evidence, that he was a late-comer to knowledge of the attack and joined impulsively to impress Mr. Golic and the others by showing support,
 - * In any event, the absence of any evidence of his participation in or knowledge of planning for an attack and the absence of any basis to infer it;
 - * Looked at more broadly, the immature reasoning that drove the entire grievance against Mr. Gordic, including the immaturity of Mr. R. participating in a group assault against someone he had never met;
 - * His secondary role in the assault itself, acting very much as a follower, raising questions about the extent to which he "chose" to take part;
 - * The complete absence of any critical thinking accompanying this very brief action, which gave no opportunity to reflect on his actions or contemplate their consequences; and
 - * The absence of any attempts to cover up the crime - only a precipitous departure from the scene.

468 The defence addressed the Crown's reliance on *Gillies* to show the importance of planning as an aggravating fact in manslaughter cases. Counsel pointed out that in fact Chief Justice McEachern was contrasting a previous decision, *R. v. Weir-Jones* (1994), 48 B.C.A.C. 295, in which an effective sentence of 10 years was upheld:

[13] ...a case where there was deliberate planning which distinguishes this case from the case at bar where the planning, such as it was, was fueled by alcohol and drugs and the dynamic of a near mob operating upon a very young person who was not functioning very well in the first place.
[Emphasis added.]

469 The latter situation, especially the role of alcohol and drugs and the presence of mob dynamics, are the precise factors that underlay Mr. R.'s participation, and should be seen as a planning of only the most limited sort.

470 The movements of the attackers shown in the video, while disturbing, do not in themselves support any significant advance planning, since some of the participants could have been instructed or decided to join mere seconds before the attack, or simply jumped in as it progressed.

471 While I found that anyone in Mr. Golic's presence would have been aware of his anger and hostility to Mr. Gordic, it is still too remote of an inference to draw that Mr. R. was aware of a plan to find and attack him, in the absence of anything linking him to the search efforts that I found were made. His counsel says that the Crown accepts the absence of any connecting evidence but still seeks to impute knowledge of the attack to him "in a roundabout manner".

472 Caution also needs to be exercised, I am urged, on the inferences that are drawn from the scene knife that contains Mr. R.'s DNA, beyond my finding in the reasons that it tended "to confirm both his presence at the scene of the attack and the performance of some operation of the knife consistent with the attack's

overall intent". Counsel points that Mr. R. could have possessed it simply to brandish it or for self-defence, although he concedes that having it for the former purpose would still represent an aggravating factor.

473 Finally, contrary to the Crown's suggestion, there were no "close social bonds" among these three offenders, whom Mr. R. had met for the first time that weekend (despite his indication in the reports that he felt very comfortable within a short period with the people at the townhouse, whom he did not previously know).

2. Length of Sentence

474 If I sentence Mr. R. as a youth, his counsel submits that a two-year period of community supervision would be appropriate. If I sentence him as an adult, a suspended sentence "for two years" (which I took to mean accompanied by two years' probation) should be imposed.

475 When applying the factors governing youth sentences in s. 38(3) of the YCJA, many of which were prominent in the previous consideration of a youth vs. adult sentence, particular attention should be given to the limited extent of Mr. R.'s role, in light of the presence of others who instigated the assault and his susceptibility to influence. While I have found that non-trivial bodily harm was reasonably foreseeable based on his participation, I still need to consider his actual perceptions at the time, including the "open question" of whether he had prior knowledge of the attack before joining for its brief duration.

476 The argument is that Mr. R. has done his best to make reparations for the harm he has caused by playing a more positive role in his family and the community.

477 The defence candidly conceded that the context of a group attack, the possession of a weapon at the attack scene and, if I find he had it, awareness of the plan to attack Mr. Gordic are all aggravating factors. Nevertheless it is argued that there are many more mitigating factors, including Mr. R.'s comparative youth with the acknowledged incomplete brain development that accompanies it; the absence of any criminal history; his strong family support and positive performance in other aspects of his life, such as employment; his demonstrated remorse; and the significant threats that he and his family have endured, which required him to withdraw from school before completing Grade 12. He has also been under strict conditions for an extensive period and has complied without fail.

478 On the value of the Golic decision as a benchmark for the manslaughter sentences that arise from this offence, counsel acknowledged that the element of planning that the Crown says was not properly reflected in Mr. Golic's sentence is certainly one factor in this case, among many. The difficulty in seeking to increase Mr. R.'s sentence on the basis that I should now give proper weight to that element is that it is uncertain to what extent Mr. R. knew of and participated in the plan to attack Mr. Gordic.

479 On the weight to be given to expressions of remorse, the defence cited LSJPA -1152, [2011 QCCQ 13205](#). In that case the 21-year-old offender, 17 at the time of the offence, had thrown a beer bottle at a friend who was leaving their group, striking him in the neck and causing his death. He was convicted of manslaughter. As of the sentencing he still denied having thrown the bottle. He received a custody and supervision order consisting of custody for one year and supervision for 18 months. The Court stressed that judges should not unduly emphasize the lack of remorse on the part of youthful offenders, because of their lower level of maturity.

480 The circumstances of R. v. J.W., [2011 NBQB 379](#) can be usefully contrasted to Mr. R.'s, in his counsel's view. Commenting on the circumstances, in which the youth had chased the victim out of the

victim's home and stabbed him to death, after advising someone he was going to do this, the judge made the following comments:

[22] He was not a misguided young fellow who was under the influence of older young fellows who were misleading him. It was he himself, and only him, who got the knife and attacked this victim. He did not need to do it. He is not like some people we see in court who are dragged along by group leaders. His degree of participation is one hundred percent. [Emphasis added.]

481 The submission is that Mr. R. is just such a person.

482 The canvass of youth sentencing cases reveal, in the defence submissions, that more aggravated circumstances, involving the offender as the main instigator of the fatal violence inflicted, have resulted in lower sentences than the Crown is seeking. In the case where a higher sentence was imposed, it was justified by aggravating features in the offender's background that are not present here:

- * R. v. S.N.J.S., [2013 BCCA 379](#): The Court of Appeal dismissed a defence appeal from a custody and supervision order with nine months of custody and nine months of supervision. The offender, who was 16 at the time of the offence and 19 at the time she was sentenced, had stabbed another girl to death at a party;
- * In R. v. R.R.B., [2005 BCPC 190](#) the 17-year-old offender had stabbed another youth to death, who had already been knocked unconscious by an associate and was being beaten by other members of the group. A friend of the deceased had earlier hit the offender in the head with a metal bar. The offender was on bail for assaulting a youth with a beer can and had a condition not to consume alcohol. He was 16 at the time of the offence and had only one unrelated conviction. He received 15 months in custody followed by seven months of supervision.
- * The offender in R. v. J.L., [2009 SKQB 409](#) had participated in a group assault in which the victim was stabbed to death. The offender was in possession of a knife during the attack but felt unable to use it. He was severely intoxicated. He fled the scene without providing assistance even though the victim was in distress. He pleaded guilty and had no criminal record but had failed to follow up with addiction counselling. His chance of reoffending was estimated to be the remarkably precise figure of 36%. He received custody for 21 months and seven months' supervision, after receiving credit for 14 months of pre-trial custody. The effective sentence was therefore 29 months of custody plus the supervision, the maximum allowable under the YCJA.

483 On the crucial theme that Mr. R. does not require incarceration for any legitimate sentencing purpose, R. v. M.D.C., [2004 MBQB 47](#) No. contains potentially supportive language. In that case the 16-year-old offender, with no criminal record and no "criminal orientation", had pleaded guilty to manslaughter and complied with strict bail conditions for two years. He had stabbed the victim in the back during a physical confrontation at the rooming house where they were both living. The sentencing judge found that "it is clear that the harm done to [the victim] occurred quickly, in the heat of a confrontation, and was not part of a pattern of violent behaviour" (para. 14) and that the only basis for incarcerating the offender would be for the purpose of general deterrence, which is not a legitimate one under the YCJA. Had it been an adult matter, the judge would have considered a conditional sentence appropriate, which was still available for manslaughter at that time. A two-year period of supervision was imposed instead.

484 If I decide that an adult sentence needs to be imposed, two suggested comparison cases are R. v. Vikilani, [2017 BCSC 2074](#) and R. v. Lai, [2006 BCCA 368](#).

485 In Vikilani the drunken 18-year-old offender had confronted a young woman who was video-recording his abusive comments towards a group of young black men at a Skytrain station. He ended up punching her in the head while she was sitting in her vehicle. When her male companion got out of their vehicle to confront him, the offender's friend stabbed him to death, with the offender punching him just after he was stabbed, without knowing that his friend had done that. The offender was a permanent resident who had been in Canada since he was three, had no criminal record, had strong family and community support, was an outstanding athlete and expressed remorse. He received an effective sentence of six months less one day and three years probation.

486 In Lai the offender was 18 at the time of the offence and in his last year of high school. He had no criminal record, no history of violence and was halfway through completing a commerce degree. He was found guilty of manslaughter by a jury for being part of a group of 20 to 30 youths, many armed with bats, who had gone to a karaoke club to attack a rival group of youths, a member of which was ultimately beaten to death. It could not be determined that the offender had struck any blows to the victim, but the jury verdict supported a conclusion that he had attended at the club with the intention of encouraging and assisting the group with an unlawful assault on the rival group. The sentencing judge had appeared to accept, as a mitigating factor in reference to this offender and the other participants who were sentenced on the same basis, "the accused were parties, aiders or abettors, not principals, and their moral culpability, in assessing the gravity of the offence and their degree of responsibility, is at the lower end of the scale than if they had struck the fatal blows." (para. 93). She imposed a conditional sentence of two years less a day, which was upheld on appeal.

D. L.Z.

1. Youth vs. Adult Sentence

487 On behalf of Mr. Z., his counsel anchored his able submissions in the fundamental principles of rehabilitation of the offender and his reintegration into society, which explicitly guide the imposition of sentences under the YCJA.

488 He argues that in this case those core objectives, as well as Mr. Z.'s accountability and the long-term protection of society, are best ensured by an IRCS order of the maximum length (four years of custody and three years of supervision). This will bring to bear the essential specialized resources that have been identified, and will be funded, to meet his needs.

489 When addressing this issue it is important for me to keep in mind the purpose of an IRCS order. In his report, Dr. Stevenson explained that it was created "in part, as an alternative to imposing an adult sentence on a youth found guilty of the most serious violent offences..." The intent is to increase public safety by reducing the likelihood that serious violent offences will be repeated, which is the ultimate goal of any custodial sentence. This is to be accomplished by designing and delivering specific therapeutic supports, tailored the youth's needs.

490 Dr. Bartel, Dr. Stevenson and Dr. Ley have indicated that such individualized services would benefit Mr. Z. Along with a well-planned reintegration into the community, these services will be essential to keeping him from returning to criminal activity when he is released.

491 An even more emphatic endorsement of its value in this case is provided by Ms. Jokai, who says there are reasonable grounds to believe that the plan "will" reduce the risk of him committing another serious violent offence. Counsel submits that Corrections officials and the doctors involved with Mr. Z. would not have developed the plan, which has been approved by the provincial director, if they did not believe that it would substantially benefit Mr. Z. and the community.

492 Crucially in the defence's submission, the detailed IRCS sentence being proposed would also address the necessary measure of accountability by Mr. Z. for his offence, the need for which the Crown has strongly emphasized in its submission.

493 An important indication of the reliability of the three expert opinions is how much common ground there is among them. In terms of Mr. Z.'s difficulties and the required solutions the writers seem to be of a similar mind, although Dr. Ley is willing "to go a bit farther" in the opinions he expresses.

494 Now that Dr. Bartel and Dr. Stevenson have seen the reasons for judgment and confirmed that their opinions have not changed there can be no suggestion that those opinions are in any way qualified or limited. It is also highly unlikely that three professionals in this field could have been duped and manipulated into accepting Mr. Z.'s new insights and positive aspirations, as the Crown suggests.

495 The J.F.R. decision offers a useful reminder, when considering Mr. Z.'s situation, that the circumstances of the offence must not be allowed to overcome the analysis of whether the presumption of diminished moral blameworthiness has been rebutted. His personal circumstances are just as relevant. In J.F.R.'s situation, the offender's numerous diagnosed disorders and the other relevant factors in her background led the Court to view her act of violence, which was unquestionably serious, through a lens of immaturity, in which she had demonstrated a lack of judgment and a sense of invincibility, which are hallmarks of youthful offenders.

496 The concurring judgment of Justice Berger in that case contains helpful additional considerations in applications for adult sentences. Rejecting the suggestion of the dissenting justice that the presumption may actually be incapable of being rebutted, Berger J.A. explained the judge's task:

[37] ...Not all young people are similarly situate. Abella, J. in...R. v. D.B...spoke of the heightened vulnerability, immaturity and reduced capacity for moral judgment of young persons. I am certain that she understood full well that such indicia are variable and always a matter of relative degree. Nor are the foundational factors exhaustive. The components of the trio of indicia cited by Abella, J., I suggest, include: diminished empathy, heightened impulsiveness, susceptibility to peer pressure and diminished ability to reason and appreciate the consequences of one's actions. All of these must be assessed on an individualized basis by the sentencing judge whose task is both delicate and difficult.

497 Unlike Rowbotham J.A., Berger J.A. would have declined to interfere with the sentencing judge's finding that the presumption of diminished moral blameworthiness had been rebutted, so he considered the critical issue in that case to be the offender's prospects for rehabilitation. The defence submits that is also the critical issue in Mr. Z.'s situation.

498 Reviewing the various reports, counsel highlighted certain comments and recurring themes that support the appropriateness of a rehabilitation-focused sentence. Some of those were:

- * As an important part of the background of the offence, Mr. Z.'s description in the presentence report of the offence taking place during a "dark period" in which his home was not safe for him due to instability. He was addicted, involved with negative peers and felt "numb", "not present" and like he was "just going through the motions";
- * As Mr. D.'s counsel suggested in relation to his test results, Mr. Z.'s identified weakness in processing speed may have affected his ability to avoid impulsivity and exercise good judgement. His ADHD is also associated with impulsivity and socially inappropriate behaviour and so treatment of it as part of the sentence will be important to preventing reoffending;
- * The shock that he underwent after the offence and the subsequent realization of the harm he has caused to Mr. Gordic's and his own family. This is an "awakening of introspection", to which the psychologists and the psychiatrist all referred. Dr. Bartel's observations of Mr. Z.'s tearfulness when discussing emotionally laden topics is a good example of this process. Finding emotions uncomfortable to discuss is the beginning of his ability to actually deal with them, it would seem. Dr. Ley also identified this crucial "turning point" in Mr. Z.'s development;
- * The important difference made to his insight by his ongoing abstinence from substances since his pre-trial incarceration, which has led to the surfacing of guilt and remorse that were previously numbed by substance use. It is a positive sign that, due to this enforced abstinence, what would have been diagnosed as substance use disorders are now in sustained remission;
- * Mr. Golic's charisma and leadership qualities, compared to Mr. Z.'s professed hatred of dealing with people and his description by school officials as a follower. This resonates with his comment in his interviews that older criminals with whom he associated looked on him as a little brother and his self-identification as a "momma's boy" who always came home at night whatever his activities;
- * His candid description of numerous criminal activities, which he was under no obligation to admit, in order to accept responsibility, come to grips with his emotions and begin to move forward towards rehabilitation. Dr. Stevenson said that Mr. Z.'s statements suggest meaningful progress towards those goals and Dr. Bartel has the impression that he is sincere in the positive changes he has made;
- * While Dr. Bartel acknowledges that the significant social control exerted over Mr. Z. plays a part in the absence of indicators of anti-social personality disorder, he has noted Mr. Z. to now be much less entrenched in criminal perspectives; and
- * Mr. Z.'s realization of the meaninglessness of the gangster code and his avowed rejection of that lifestyle.

499 Dr. Bartel clearly indicates that Mr. Z. did not exhibit the required indications of maturity at the time of the offence, which Bowden J. aptly described in P.H. as "the insight into the wrongdoing of a more mature, reflective or considered adult..." (para. 96).

500 While the second of the two lenses for understanding the offence offered by Dr. Stevenson (the one centered on Mr. Z.'s impulsivity and the group atmosphere encouraging the attack) is submitted to be the most accurate, his counsel points out that Dr. Stevenson went on to say through either lens it is possible to see that Mr. Z. "[d]espite his criminal versatility...was not a mature or broadly sophisticated young person", lacking the various attributes of maturity that the doctor went on to list.

501 On the same point, Dr. Stevenson's comments in the conclusion of his report were that the offence could be seen as "a highly impulsive act by an immature (albeit street-wise) young person", in combination with Mr. Z.'s unthinking alliance to Mr. Golic, his substance-impaired judgment (which counsel stresses is simply a reflection of the likely level of disinhibition that I referred to in my reasons, not a re-litigation of the intoxication defence), and the mob mentality that prevailed - with the speed of his reaction leading to little opportunity to consider the reason for the attack, or anticipate the consequences.

502 Of particular significance are Dr. Bartel's (1) observations that Mr. Z. "possibly" has a lower risk of reoffending than he did previously and (2) belief that Mr. Z. can maintain himself as a lower risk over the long term. These opinions rest not just on the literature relating to adolescence being the most frequent period of violent offending but also Mr. Z.'s specific steps, in the form of his attitudinal changes and cessation of substance use.

503 Dr. Stevenson describes detailed treatment requirements, and a process for reintegrating Mr. Z. into the community once the custodial portion of the sentence has been completed. His counsel submits that the objectives of rehabilitation and reintegration are much more likely to be achieved through the tailored IRCS youth sentence than by simply releasing him on parole after an adult sentence. This plan offers the kind of reasonable prospect of rehabilitation that was described in the A.O. decision.

504 While both doctors explain that the in-custody treatment component can be provided in either the adult or youth regimes, they maintain that the post-release psychological services and related supports are crucial to "continue and solidify his rehabilitation". The basic prohibitions against certain types of conduct on federal parole will not offer this level of support. In contrast, a community-based youth sentence, even without an IRCS, can provide the necessary degree of structure, as well as support across a wide range of needs.

505 Given Mr. Z.'s comments to Dr. Bartel about the absence of anyone to share his feelings with, it bodes well for his rehabilitation that he was able to form a rapport with him and Dr. Stevenson after a few hours.

506 On the question of the type of custody, counsel says that attention should be paid to Dr. Stevenson's comments that incarcerating Mr. Z. in a facility in which he is likely to be victimized and exposed to negative influences is very undesirable. If he receives an adult sentence he is likely to be sent to Kent Institution, the highest-security federal institution in this province, an outcome that everyone who has had contact with Mr. Z. has said would be disastrous for him.

507 If I am considering imposing an IRCS, I should not be deterred by the practice of Corrections seeking to transfer an offender to a federal institution for a sentence of longer than two years. Counsel reminds me that under s. 89(2) it is the court that makes that decision, which needs to be in the best interests of the young person and in the public interest. And, regardless of how such an application might ultimately be resolved, at this stage it is not part of the analysis in reaching an appropriate sentence. An option that would avoid that problem entirely would be to impose the custodial portion in the provincial range, with the community supervision portion of the IRCS comprising the balance of the seven-year period. The important thing to keep in mind in this regard is that the IRCS is a means of delivering targeted services, and is "separate and apart" from the specific apportionment of custody and community supervision that is imposed.

508 Examining the proposed structure of the IRCS, it can readily be seen that the bulk of the resources will be allocated to the critical community portion of the sentence. This is in stark contrast to Mr. Z. being

released on strict parole conditions, after spending at least seven years with hardened federal inmates, with no intensively-managed support of the kind the experts say is essential in order for him to succeed.

509 Lastly, counsel notes the absence of any direct reference in the Crown's submission to how the presumption of moral blameworthiness can be rebutted for Mr. Z., in light of the consistent findings and opinions about him in the reports. Nor does the Crown really address why a youth sentence would not have sufficient length to hold Mr. Z. accountable, he submits, in the face of such a comprehensive IRCS plan. It is critical, he emphasizes, that we not carry out vengeance in the guise of rehabilitation here, leading me to impose a sentence of a length and in a form that will have the exact opposite effect to the objectives that the YCJA was enacted to achieve.

VIII. DISCUSSION AND CONCLUSION

A. Youth vs. Adult Sentences

1. Overview

510 There are some general comments on this issue that apply to all three offenders.

511 First, I am unable to agree with the Crown that the applicability of the presumption of diminished moral blameworthiness can be subject to a sliding scale of applicability, the closer the offender was to 18 at the time of the offence. It is clear from D.B. that the presumption applies equally to all offenders who fall under the jurisdiction of the YCJA and is not diluted for older offenders in the manner suggested.

512 As a practical matter of course, older offenders will normally have matured more in their progress towards adulthood, as Pratt describes, and so it is more likely, all other things being equal, to find offenders to whom the presumption is proven not to apply in that age group. That is why the age of the offender is still a relevant consideration under s. 72(1)(a), as listed in Chol. But the rebuttal of the presumption still always has to be fully demonstrated against the specific offender in that specific case.

513 However, I do agree with the Crown's submission that the hypothetical "adult" to whom the maturity of the offender is to be compared when applying s-s (a) does not need to be a person of especially advanced maturity, judgment or sophistication. It is simply a person who has matured to a point that the deficits in those qualities that the YCJA presumes all young persons have are no longer present. Comparing youthful offenders to a more ideal level of maturity would require the Crown to prove that they are more mature than many of their adult counterparts, which I conclude cannot have been the intention of the legislation.

514 As is obvious from the fact that the presumption can be rebutted, the developmental process described in D.B. does not apply invariably and uniformly to all youthful offenders. In addition to those offenders who progress more rapidly in a purely developmental sense, there are also those who have demonstrated that they possess "the level of maturity, moral sophistication and capacity for independent judgment of an adult" through the lifestyle and actions in which they engaged, in the commission of the offence itself and/or in their lives more generally. It also seems clear that the demonstration of those qualities for criminal purposes may indicate their presence just as clearly as prosocial purposes.

515 Next, I think the dispute between the Crown and the defence about whether this offence was planned or spontaneous, which applies to all three offenders, is really a question of degree.

516 On one hand, however long Mr. Golic had been harboring intentions to assault Mr. Gordic that day,

it is clear that the group assembled at the townhouse shortly before midnight and carried out the attack around 12:30 a.m., so any group participation in a plan was of fairly short duration. In addition, the plan was obviously a basic one: to look around the village, find Mr. Gordic and beat him up. So while it was not spontaneous, as one might describe the instant reactions to provocation or sudden acts within melees that are seen in some of the cases, this plan still merits descriptions such as short-term and basic. The fact that it was in existence for considerably longer and reflected a great deal more forethought than the attack in the Plowman/Miazga case does not mean that it was particularly elaborate or sophisticated in itself. I would add to the factors that suggest a more spontaneous aspect the fact that all three offenders were taking on a cause that was not their own, and in the case of Mr. D., interrupting specific plans that he was making on behalf of himself and Mr. Z. for socializing with the young women and their friends later in the evening. The attack itself was brief and seems to have broken off upon Mr. Z. proclaiming that he had "juke" Mr. Golic, with the participants then fleeing.

517 On the other hand, even allowing for the motivators of intoxication, loyalty to Mr. Golic and the group mentality, the search for Mr. Gordic was carried out over a long enough time and distance to have offered opportunities for reflection on the planned assault in a way that, say, a reactive punch or stab in an ongoing brawl would not. The Crown makes the telling point that some members of the group that had been looking for Mr. Gordic thought the better of it and did not pursue the actual attack. In other words, these three offenders had to sustain their intention for a meaningful period. It is also clear from the way the attackers pursued Mr. Gordic once they sighted him, the last portion of which was shown on the video, that they intended to participate in a group assault, during which the participation of all of them at the same time was intended to overwhelm him. It was an actual targeted swarming of a victim, not a general free-for-all in which there was any kind of casual or last-second involvement by any of the nine.

518 Further, although this was an utterly needless and pointless attack, I am not prepared to find that the motive was immature reasoning per se. It seems to have been about defending Mr. Golic's honour against someone who had purported to correct his behaviour, and I feel comfortable taking notice, based on numerous cases before the courts, that this hypervigilance about one's honour and the defence of it by allies is also common among adult offenders, such as in prison or organized crime settings.

519 As another introductory comment, it is essential that the fact that Mr. D. and Mr. R. maintain the exculpatory versions of their involvement that they testified to at trial (although Mr. R. says he accepts the verdict) not be used as an aggravating factor, either in the application for an adult sentence or generally on sentencing. I disbelieved their evidence and found that they participated in the assault, and I will be sentencing them on that basis. But they cannot be subject to more serious consequences, including an adult sentence, because they say they should not have been convicted, and in Mr. D.'s case plan to appeal. Bennett J.A. addressed this issue helpfully in Wong:

[39] Had the judge relied on Mr. Wong's so-called lack of remorse and refusal to speak to the doctors as an aggravating factor in the sentencing process, he would have committed an error in principle. Lack of remorse is not an aggravating factor: R. v. Zeek, [2004 BCCA 42](#) at para. 24. This is particularly so when an appeal is outstanding. There may be exceptional cases where a lack of remorse is indicative of a risk to the public and therefore will become an aggravating factor: R. v. Dreger, [2014 BCCA 54](#) at para. 51. When present, remorse is generally a mitigating factor. The judge reviewed what he considered aggravating and mitigating factors at para. 64 of his reasons. There is no mention of lack of remorse.

[40] When the reasons are considered as a whole, it is clear that the sentencing judge did not use the lack of cooperation or remorse in an inappropriate way. He was reporting the absence of these circumstances in the context of his inability to assess Mr. Wong's lack of "recognition of the

consequences of his conduct" (para. 71). He did not use this evidence as an aggravating feature of the evidence that tipped in favour of an adult sentence.

[Emphasis added.]

520 In fact, the offenders have expressed regret and remorse for those actions, or failures to act, for which they admit responsibility. That deserves to be weighed on its own merits for each of them as a potential mitigating factor. It is not automatically devalued because it is offered in an exculpatory context. In any case, it is not the sincerity of the expressions of emotion that matter, it is the resulting efforts towards rehabilitation of an offender that are entitled to weight, as explained in R. v. Anderson ([1992](#)), [74 C.C.C. \(3d\) 523](#) (B.C.C.A.), at pp. 535 and 536:

The factor of "remorse" is often important. In so far as it might be suggested that the court should regard those who come before it in a submissive or contrite manner as deserving of more lenient treatment than those who accept their predicament with whatever fortitude they are able to summon, there would be little in this factor which could assist the sentencing judge. But to the extent that an accused person is able to demonstrate that he or she has, since the commission of the crime, come to realize the gravity of the conduct, and as a result has achieved a change in attitude or imposed some self-discipline which significantly reduces the likelihood of further offending, the existence of remorse in this sense obviously has much importance. [Emphasis in original.]

521 Again, the "gravity of the conduct" to which they admit is not the same as what I found, but to the extent that they have taken action to improve themselves based on their admission of having drunkenly associated with a group that ended up causing Mr. Gordic's death (or in Mr. Z.'s case, having become so intoxicated that he caused Mr. Gordic's death without having had the intent to do so), such actions deserve to be weighed in their favour.

522 Finally, for the s. 72(1)(a) analysis on each offender, I will be applying the list of considerations identified in Chol, not as a rigid checklist but as a guide to the factors that are likely to be the most relevant.

2. A.S.D.

a. Section 72(1)(a)

(i) The Offender

523 As I have discussed, to the extent that it may reflect his development at that point, it is relevant that Mr. D. was within two and half months of turning 18 at the time of the offence. However, according to the reports he was still firmly ensconced within his family structure at that time, which was close-knit. His conflict with his parents had to do with the limits that they were placing on him to rein in his misbehaviour, and do not seem to suggest a rejection by him of their overall authority, or efforts by him to function independently of them.

524 Although there are the concerning comments from the school official about him "wanting to be known and feared" and his negative interactions with other students, no specific association with "negative peers" was confirmed and the school counsellor said his only problem as a student was the decline in his attendance, which caused him to fail classes. His explanation - that he did not attend classes in subjects he was not interested in and preferred to hang out with friends - is certainly plausible, and is suggestive of immaturity.

525 There is some conflict in the reports about how close he was to Mr. Golic before the offence. His mother's letter to the court also raises concerns about Mr. Golic's negative influence. Even assuming that Mr. D.'s description in the pre-sentence report of being close friends with him is true, there is no evidence that he engaged in any criminal activity, let alone the serious ones that Mr. Z. attributed to Mr. Golic and himself. I think it is fair to say that Mr. D. had begun to involve himself with an unsavoury character as a friend, but not that he was operating in any generally antisocial manner.

526 He was greatly appreciated for his community work of soccer refereeing and coaching, according to the reference letters. Those roles do not, on their face, call for the exercise of any adult-level qualities, but they are also not characteristic of an alienated, antisocial young person who was devoting himself fully to negative activities.

527 Despite some variability in his intellectual abilities in different areas of functioning, he has no diagnosable disability, nor any acute psychiatric conditions. Overall Dr. Steiger found no "intellectual or social-emotional factors that would have limited his judgment or insight".

528 Both she and Dr. Singh commented positively on his social maturity, with Dr. Steiger describing it as "average to above average". On the other hand, Dr. Steiger noted his unawareness of his immature presentation during the interview and Dr. Singh found that he came across as immature emotionally. A possible explanation offered for his grandiose statements and preoccupation with wealth was his lack of life experience, but Dr. Singh considered the grandiosity a sufficient risk factor in itself to require counselling, because it can impair his judgment. Their observations about it probably correspond to his youth probation officer's remark about his substantial ego.

529 It is relevant to the issue of his maturity and vulnerability to others that Dr. Steiger attributes the offence to, among other things "developmental factors" and "association with relatively more antisocial and violent peers". It is also relevant that one of his major risk factors, identified by both experts, is the resumption of such associations, in the context of substance use.

(ii) The Offence

530 With respect to Mr. D.'s specific involvement, his efforts to question Mr. Gordic's friends about his location shows an even greater degree of participation in the aims of the group than merely following along, and would have required more deliberation than mere passive presence.

531 As to the actual attack, he can be ruled out as any of the last three attackers. They returned north in the direction that they had come, whereas I was satisfied that Mr. D., Mr. R. and Mr. Z. are the ones depicted in the 7-Eleven video south of the attack area on Main Street shortly afterwards. He also does not physically resemble attacker six, the last member of the first wave to pursue Mr. Gordic off-screen to the left in the video. Excluding Mr. Z. and Mr. Golic as the first two attackers, this means that he was the third, fourth or fifth one - making him part of the most advanced group to pursue Mr. Gordic.

532 I think Mr. D.'s understanding of the consequences of the offence at the time of its commission would have tracked the mens rea of manslaughter: that Mr. Gordic would suffer a group beating with physical consequences to him that went beyond the trivial. I am also satisfied that Mr. D. would also have understood, in a general way the criminal sanctions applicable to such actions. The period in which the search was carried strengthened those opportunities, although I recognize the role that his intoxication would have played in blunting them.

(iii) Post-offence

533 Mr. D. has, as I have said, taken a limited degree of responsibility for his role in the offence, consistent with his maintained innocence, and expressed a degree of remorse for the tragic outcome. There are some self-serving and inconsistent aspects of his descriptions of his involvement in the reports, as I have summarized, but these are not specifically indicative of immaturity; they are a characteristic of many offenders at a variety of ages.

534 The reports do not disclose a significant amount of personal growth since the offence, although he says that this has occurred, and residual degrees of immaturity have been identified despite his good degree of social maturity.

(iv) Conclusion

535 The evidence shows a young person still largely dependent on his family, pushing against the bounds of parental control in a typically adolescent manner, while at least flirting with association with much more seriously criminally-involved associates. He does not show the immersion in adult levels of criminality or repeated defiance of criminal or social norms that is found in the cases where s-s (a) has been satisfied. Even at his current more advanced age he did not present as fully mature in the evaluations for the reports; maintaining a self-image and plans for the future that have little adult reality to them. This is a case in which it is appropriate to accept those expert observations because they resonate with the actual surrounding circumstances.

536 The Crown is correct to emphasize the more ominous aspects of the offence. This was not a case of some drunken teenagers losing their heads for a few seconds in the course of a consensual brawl. It was a targeted swarming, the violent intention for which was maintained over some time and distance. Mr. D. was among the first wave of a group that he would have known was engaged in outnumbering Mr. Gordic in order to administer a beating to him. All that said, and acknowledging that such conduct is also engaged in by adults, as in the attack in *Plowman/Miazga*, I cannot identify anything in the offence itself that particularly demonstrates the exercise of any adult-like attributes.

537 Finally his post-offence conduct and evaluations are suggestive of a young person who has not yet come to a full, adult appreciation of the world, even now having passed out of the jurisdiction of the YCJA.

538 As a result, I am unable to be satisfied that Mr. D. possessed the level of maturity, moral sophistication and capacity for independent judgment of an adult at the time of the offence.

b. Section 72(1)(b)

539 While my finding that the presumption of Mr. D.'s diminished moral blameworthiness has not been rebutted disposes of the Crown's application to have him receive an adult sentence, I will also address the question posed by s-s (b).

540 I have already characterized the nature of the offence and Mr. D.'s role in it for the purposes of s-s (a). It is unquestionably highly morally blameworthy. The period of time over which the intention to assault Mr. Gordic persisted and the focused manner in which it was carried out, with full awareness that it was a group assault on a single victim, represent a high degree of intentional risk-taking. The consequent harm was the death of Mr. Gordic in the course of the assault, which is the greatest level of harm the criminal law envisions. And the normative character of a swarming, a cowardly and dangerous

act in which Mr. D. enthusiastically joined (after taking a prominent role in the search for the victim), represents a significant departure from accepted behaviour in society.

541 I acknowledge the Crown's points that manslaughter is a crime of consequences and that the possibility that someone else in a group will do something more serious is part of the risk that one assumes by participating in a group attack. But the only available inference remains that from Mr. D.'s perspective, this was intended to be an assault on Mr. Gordic. The objective foreseeability of harm arising from his participation in the assault, in combination with Mr. Z.'s escalation of it to fatal violence, is what makes his crime manslaughter, but his moral blameworthiness is obviously not driven solely by that fatal outcome, and is not the equivalent of Mr. Z.'s. In my opinion his degree of moral blameworthiness, while high in its own way, still falls within a range that the maximum youth sentence in keeping with the purpose and principles in s. 3(1)(b)(ii) and s. 38 would be long enough to hold him accountable. I am satisfied that the just sanctions envisioned within that sentencing regime can in fact achieve the necessary measure of accountability for him, as I will explain.

542 I also think that a youth sentence would provide reasonable assurance of Mr. D.'s rehabilitation and reintegration into society. His risk of reoffending is low, his prospects for rehabilitation are strong and his treatment needs are quite specific - to address any future substance abuse and the resulting association with negative, more criminally-involved peers. His compliance with community supervision has been exemplary. He has positive goals that are not inherently unrealistic, although the magnitude of his resulting wealth may be. It seems highly likely that his complete rehabilitation can be accomplished within the maximum youth period.

c. Conclusion

543 Mr. D. will receive a youth sentence.

3. G.C.A.R.

a. Section 72(1)(a)

(i) The Offender

544 Again, to the extent that it says anything about his expected stage of development, he had recently turned 17 at the time of the offence. Like Mr. D. he had a close, supportive family relationship. Although there is an indication that his parents were aware of and concerned about the decline in his school performance, there is no suggestion that he was functioning independently from them in any respect.

545 To a greater extent than for Mr. D., the reports show that Mr. R. was associating with and operating on the periphery of a group of gang-involved youths. There is no particular reason to doubt his claim only to have socialized with them, which is supported by his complete lack of criminal history, but it appears that he was beginning to identify with them in some ways (such as in the incident that required him to change schools) and on the whole he was clearly preferring those relationships to attending school and completing his schoolwork. I would describe his pre-offence behaviour as nascent anti-social activity, not brought to any serious point yet.

546 The personality attributes of having a high need for acceptance and tending to submit to the wishes of more assertive peers clearly played a role in his participation in this offence, as Dr. Gangopadhyay describes. These are not exclusively youthful attributes of course, but the observation of Dr. Stevenson

that Mr. R. had a "naïve wish to be part of an edgier, more exciting group" fits well with the overall circumstances of his pre-offence life described in the reports and tends to weigh in favour of his immaturity.

547 He experiences anxiety and sadness as a result of his involvement in this matter, but there are no serious psychological problems or any cognitive limitations that would bear on an assessment of his maturity.

548 Dr. Gangopadhyay said that swarming is "an inherently immature act" and that it could be argued that in engaging in it Mr. R. was "displaying the diminished culpability assumed of young people". Acknowledging that swarming may well be more frequently committed by youthful offenders, I am wary of accepting such broad assertions about assumed behaviour at given developmental stages, and prefer to focus on what attributes of immaturity or maturity can be confidently ascribed specifically to the offender on the evidence.

549 There are also some factors indicating maturity on Mr. R.'s part - his employment record and his insight about the financial hardship caused to his parents by the costs of his defence for examples - but I do not interpret them as indicating a significantly advanced level for his age.

(ii) The offence

550 All of my general comments about the nature of the offence with respect to Mr. D. apply equally to Mr. R., including his awareness of the likely consequences of participating in it, so I will not repeat them.

551 In Mr. R.'s specific case, I think the defence theory that he could have joined the assault more impulsively at a very late stage is ruled out by the evidence of how the attacking group sighted and then pursued Mr. Gordic from a different area of Marketplace, and the way the attackers are shown arriving and pursuing him on the video. Despite the failure of anyone to identify him among the group that was asking about Mr. Gordic, I am also satisfied that he joined the group at the townhouse and took on its purpose from the outset.

552 As I indicated in relation to Mr. D., I generally accept the Crown's analysis that these offenders were not the last three attackers who are seen returning north. Where I disagree is that I did not find that Mr. R. was not attacker six in my reasons; I only rejected his evidence that if he had been that attacker he would not have looked at the attack going on next to him until the point that he claimed. He may well have been attacker six; it is not necessary or possible to say. I am satisfied that he was in the first group of six attackers, but he may have been at the end of that group.

553 Bringing a knife to the scene and opening it reflects yet a further degree of thought and deliberation beyond merely travelling around the village with the group's goal in mind, even though it is not suggested that he used it in the attack or knew of Mr. Z.'s use of one. It is a separate act of preparation and aggression that weighs further against pure impulsiveness. The cut to Mr. R.'s finger and the abandonment of the knife at the scene tends to suggest that it was produced much later in the process than his first joining the group though, with less opportunity for reflection.

554 Hailing the police officers after fleeing the attack scene and asking them for directions to his townhouse could be seen as a clever ruse to deflect suspicion from himself or as a naïve belief that he could obtain that information without being suspected. In light of all of the other information about his behaviour that is available, I think it is likely to have been the latter.

(iii) Post-offence

555 Mr. R.'s statements of remorse are quite insightful and not especially self-serving, as such statements go. He seems to be appropriately ashamed and guilt-ridden. Even though he has maintained his exculpatory version of events, both with respect to participating in the attack and possessing the knife, by stating that he accepts the verdict, he comes as close as he can to an admission of responsibility without abandoning that version. There is no basis on which to attribute a certain degree of personal growth to him since the offence but its seemingly genuine chastening effect on him suggests an increase in maturity since then.

(iv) Conclusion

556 My conclusions are similar to those with respect to Mr. D.

557 Mr. R. seems to have been living in the usual dependent relationship with his parents of a typical senior high school student. His flirtation with gang-involved friends affected his school performance adversely and he was resistant to shedding those connections, justifying his resistance with the claim that they were purely social. He can be seen as a youth who was on the borderline of gang involvement but not yet engaged in it. He shows none of the sophisticated criminality, or repeated moral choices of adult-like offenders. He also had a susceptibility to peer influence that I am satisfied is at least partly related to his maturity level. He certainly demonstrated some maturity in his employment as a student, especially his post-offence placement from the alternative school. This seems to be a facet of his life in which he was high-functioning.

558 Like Mr. D.'s leadership role in the search for Mr. Gordic, Mr. R.'s production of the knife adds a further layer of deliberative conduct to simply joining the group and participating in the attack. But there was nothing sophisticated about that act in itself and the manner in which he cut himself attempting to open it hints more strongly at a lack of skill and experience.

559 Within the bounds of maintaining his position at trial, he shows reasonable insights into the consequences of his actions and appropriate remorse. One can infer that he has matured since its commission.

560 All in all, his actions and surrounding circumstances at the time of the offence seem to me to be characteristic of a youthful offender as envisioned by the YCJA. I cannot be satisfied that he possessed the required attributes to rebut the presumption of diminished blameworthiness at that time.

b. Section 72(1)(b)

561 As in Mr. D.'s case I will go on to consider the applicability of s-s (b) even though my finding on s-s (a) resolves the Crown's application.

562 I adopt my comments with respect to the offence from the discussion of Mr. D.'s moral blameworthiness. Mr. R. bringing a knife to the attack and opening it there obviously adds another level of seriousness to the intentional risk-taking inherent in the attack itself, and to its normative character. I must infer that some thought was given by him to using it, even if it was of short duration and aborted by cutting himself. Yet even with those aggravating features, this is still an offence in which his involvement in the lead-up and his actual participation were on the footing of administering a beating to Mr. Gordic. However worthy of condemnation that may be, it is not at the same level of blameworthiness as the

homicidal one to which Mr. Z. escalated it. I can see no basis on which the maximum youth range of sentence would be inadequate to instill accountability for it.

563 As to rehabilitation, Mr. R.'s prospects seem even more positive than Mr. D.'s. His risk of reoffending is low, his treatment needs are limited and are expressed as being able to be met in the community, and both Dr. Gangopadhyay and Dr. Stevenson express positive views of his future progress if he attends to those limited concerns. He has a positive work history, strong family support and an attitude of embracing self-improvement. His likelihood of being rehabilitated within the duration of a youth sentence seems strong.

c. Conclusion

564 Mr. R. will receive a youth sentence.

4. L.Z.

a. Section 72(1)(a)

(i) The Offender

565 It is important to say at the outset of this section that although I do not find that Mr. Z. has deceived the writers of the psychological and psychiatric reports, as the Crown has suggested, or that they lack expertise in this area in any respect, I have concluded that their reports do not address accurately the actual criteria for determining whether the presumption of diminished moral blameworthiness of a young person has been rebutted, as expressed in the case authorities. Specifically, I conclude that they have paid insufficient attention to the qualities of maturity, moral sophistication and capacity for independent judgment of an adult that were demonstrated by Mr. Z. in his personal circumstances.

566 It seems to me that they have equated criminal behaviour by a youth too readily and automatically with immaturity, without considering fully the implications of the particular ways in which Mr. Z. engaged in criminal activities, including the level of seriousness and sophistication of those activities, and the qualities that he needed to possess to function at that level. The classic youthful offending that they appear to have in mind does not accurately represent what Mr. Z. has described.

567 I found Dr. Bartel to be the most realistic assessor of these demonstrated qualities, conceding that Mr. Z. operated a sophisticated drug operation, including its financial aspects, functioned largely independently of his parents and in some ways was in charge of them. He also refers to Mr. Z.'s instrumental use of Xanax to insulate him from the emotional effects of engaging in violent criminal behaviour. Dr. Bartel observes that while Mr. Z. had not inflicted fatal violence before, and Mr. Gordic was not involved in his criminal milieu, the type of violence he inflicted was nevertheless characteristic of his previous criminal activities.

568 However, Dr. Bartel's consideration of Mr. Z.'s maturity was carried out with reference mainly to the attributes of adolescence as a developmental life stage, with its greater susceptibility to impulsivity risk taking and violence, as well as susceptibility to peer pressure. He certainly included some qualities that were specifically identified in Mr. Z. as bearing on this issue, such as his tendency to be a follower and his specific allegiance to Mr. Golic (although he admitted that the role of ADHD in his participation in the offence was conjecture) but in general I conclude that he gave an opinion that was too dependent on the

general understanding of the adolescent developmental process and insufficiently rooted in Mr. Z.'s specific, demonstrated behaviour.

569 Rather than applying developmental stages too generically, as I find Dr. Bartel did, it seemed to me that Dr. Stevenson applied too high a standard for maturity in reaching his conclusions. Even though he found Mr. Z. to be "a criminally-experienced and street-wise youth, immersed in a violent subculture", and that he had "criminal versatility", which Mr. Z.'s disclosures amply demonstrate, Dr. Stevenson found that he was "not mature or broadly sophisticated". To support this conclusion he referred to Mr. Z.'s lack of "autonomy, positive self-esteem, good judgement with sound decision-making, self control (including delayed gratification) and emotional regulation skills." In my opinion, these are more the attributes of a fully-mature and well-adjusted adult, not the simple maturation beyond the presumed disabilities of youth of which the law requires me to be satisfied.

570 For his part, Dr. Ley added "very immature" as the last of the attributes that, in his opinion, Mr. Z. would have possessed at the time of the offence. These attributes included, for example "a strong criminal orientation that had been established in early adolescence" and being "very hedonistic and materialistic". The comment about maturity was not supported by the extensive analysis of Mr. Z.'s circumstances that preceded it - it seemed to come out of nowhere. The same is true of Dr. Ley's subsequent comment that Mr. Z. was "an immature person who was susceptible to peer influence". There was no apparent reckoning, in relation to either of these comments, with the implications for his maturity of his pre-offence lifestyle.

571 In my opinion the following factors more accurately demonstrate Mr. Z.'s actual level of maturity at the time of the offence:

- * His sheer number of prior serious criminal acts, during each of which he would have had the opportunity to reflect on his course of action and exercise moral choices;
- * Beyond their sheer number, the sophistication of these acts, including the targeting of victims in side streets near a transit station, shifting to the more lucrative robberies of drug dealers, based on the moral reasoning that these victims were deserving of being robbed;
- * His use of a firearm, including cocking it, to instill fear and obtain compliance during the course of robberies;
- * The deliberate choice to numb his emotional responses to violence by the ingestion of Xanax, which he described in that context as a "superman" drug by means of which "you can do any thing...you won't feel anything...you just don't care and you feel great". He reported a more general desensitization to violence by the time he was 17;
- * His ability to operate under the radar of his probation following his previous conviction, maintaining an interrupted association with Mr. Golic and continuing his criminal activity;
- * His operation of a sophisticated and highly lucrative drug trafficking operation, which he was ultimately able to hand off on the basis that he would continue to receive some of the proceeds, including part of the time that he has been facing this offence;
- * His idolization and adoption as a father figure of a Hells Angel, whose values he also adopted and whose death he commemorated with a tattoo. Notably it was the death of this figure, whom Mr. Z. still describes in glowing terms, that signalled his disavowal of the gang lifestyle, not his murder of Mr. Gordic. And that disavowal was based on his recognition that there is "no honour among thieves" rather than any general moral awakening;

- * His living in a virtually emancipated state from his parents, operating his drug business and other criminal activities under their noses, expanding his substance abuse to include alcohol while living in the basement suite of their home and orchestrating their participation in a false alibi to cover up his bail breach;
- * His association with gang members, including his presence during a torture and his more general involvement with his associates in fights among and within various groups and drive-by shootings; and
- * The motives of money, and later status and power, that underlay his activities.

572 In my opinion, Mr. Z.'s circumstances at the time of the offence weigh in favour of a finding that he possessed the maturity, moral sophistication and capacity for independent judgment of an adult, albeit an adult who is entrenched in serious criminality.

573 In expressing that opinion I am keeping in mind such mitigating matters as Mr. Z.'s ADHD and its contribution to his impulsiveness; the immature behaviour he exhibited at the alternative school; his susceptibility to the influence of others, including Mr. Golic, Mr. Golic's uncle and the adult criminals whom he said protected him; the family circumstances that led him to seek such role models; and the fact that, even if it was deliberately self-induced to facilitate crime, he was frequently intoxicated. My point is that even allowing for factors that suggest more youthful vulnerability, and accepting that a young person may not function at the same level in all aspects of their life, the overall portrait that emerges is of a person whose adopted lifestyle was indistinguishable, in any of the ways that are to be assessed under s-s (a), from that of a relatively sophisticated and independent criminal adult.

574 I am also keeping in mind that the entrenched criminal activity in question was reported by Mr. Z. himself. Despite this, I see no inappropriateness or unfairness in relying on that information to reach my conclusions. His candour in making these extensive admissions was weighed strongly in his favour by the experts on the issue of rehabilitation, which I have taken into account. More importantly, the information formed the basis of the analysis of his pre-offence circumstances, not just in the court-ordered reports, but in the opinion of Dr. Ley, who was retained on his behalf. All of the experts accepted it as an accurate basis and interpreted Mr. Z.'s current circumstances by reference to it. I also find it unlikely that Mr. Z. would have exaggerated that behaviour significantly. Claiming to have been a more serious criminal than he really was would only make it more difficult for the court to accept that he has succeeded in changing his attitudes, as he strongly maintains, and if exaggeration had been his goal, I do not think he would also have made it clear to the experts that he has not told them the full extent of his criminal activities.

(ii) The Offence

575 I will not repeat my general characterization of the events preceding the offence. It applies equally to Mr. Z.

576 Like Mr. D., he broke off from potential further plans with the young women to join the group, he had no personal stake in Mr. Golic's vendetta and no animosity towards Mr. Gordic, whom he knew. He was also disinhibited to a degree by the substances he had consumed to that point, even if the intoxication defence was not made out.

577 In these respects the circumstances of the offence do not weigh any more heavily in favour of the exercise of adult-like qualities than they do for the other offenders.

578 Where I think those circumstances become more indicative of maturity in his case is the actual

manner in which he carried out the stabbing. There is no basis to infer that he formed the intent to cause Mr. Gordic serious bodily harm that he knew was likely to cause death at any particular point during the search, but it is significant that as he drew closer to Mr. Gordic in the lead-up to the attack he exposed the knife at his waist. More significantly, in the 17 seconds between Mr. Golic's disappearance from the video in pursuit and Mr. Gordic's reappearance, Mr. Z. was able to close the gap to Mr. Gordic, inflict three stab wounds, one fatal and one potentially so, to the upper left side of Mr. Gordic's body, call out that he had stabbed him and flee the scene. In contrast to the actions that one might associate with an immature and inexperienced offender, such as flailing around to inflict any possible injury or overkill in the grips of extreme emotion, these actions have an efficient, focused, almost clinical quality that suggests experience in the infliction of serious violence.

579 In this respect, I think that Dr. Stevenson, after having the chance to review reasons for judgment, unreasonably maintained his initial characterization of the degree of impulsiveness underlying the commission of the offence. I have found that there was a much longer period of time in which the group looked for Mr. Gordic with the intention of assaulting him, a longer and more targeted lead-up to the actual attack by the group and, as just described, a more focused manner of carrying out the stabbing than Dr. Stevenson envisioned. To that extent, his opinion on the implications of the offence for Mr. Z.'s maturity is correspondingly undermined.

(iii) Post-offence

580 Because of what the experts consider to be a significant gap between Mr. Z.'s previous circumstance and his current attitude and prospects, much of his post-offence activity is most relevant to the assessment of rehabilitation under s-s (b). What is relevant to the presumption of diminished moral blameworthiness is that Mr. Z. does not dispute his involvement, although he maintains the lack of memory that underlay his intoxication defence. He expresses remorse for the harm he has caused, but appears to have an unusual conception of Mr. Gordic's death and his role in it as the manifestations of fate or a malevolent force. In this conception he distances himself somewhat from the active and essential degree of participation in it that he actually had.

581 There is no question that the experts believe that Mr. Z. had had some kind of awakening as a result of the death of his role model, his involvement in this offence, the cessation of his substance use and the incapacitation brought about by his house arrest conditions. I will say more about that on the issue of rehabilitation. Under the current heading, while such improved attitudes and receptiveness to rehabilitative steps might often lead to a retrospective inference that the young person was less mature at the earlier, less insightful stage, in this case Mr. Z.'s demonstrated adult-like criminal sophistication in that earlier period, as I have described, prevents me from drawing such an inference. If he has achieved new insights, which there is reason to believe, I find him to be on the same footing as an adult criminal who has achieved them.

(iv) Conclusion

582 For these reasons, I find that the presumption of diminished moral blameworthiness has been rebutted.

b. Section 72(1)(b)

583 The high level of moral blameworthiness that I found in Mr. D.'s and Mr. R.'s involvement in a targeted swarming, with a degree of advance planning and foregone opportunities to abandon its execution, forms only the foundation of Mr. Z.'s moral blameworthiness. To that foundation should be

added his deliberate decision to escalate a serious but almost certainly non-fatal attack by his use of a knife to stab his innocent victim, who was rendered unable to protect himself by the number of attackers surrounding him. This swiftly executed attack had, as I have said, an efficient and clinical quality to it, and was directed to an area of the body that was likely to result in maximum harm. Once achieved, it was proclaimed in a triumphant fashion by Mr. Z., before he fled the scene. This pointless snuffing-out of the life of a young man whose supposed offence had been to try to discourage Mr. Golic from harassing his ex-girlfriend can fairly be described as the culmination of Mr. Z.'s lifestyle of serious criminality, during which he had become habituated to the infliction of this level of violence. It was dangerous conduct that reflected a very high degree of intentional risk-taking, resulting in the maximum possible harm that one human being can inflict on another, and represented overall quite a pronounced and chilling rejection of the normative standards of behaviour in society.

584 I find as a result that the maximum sentence provided for second degree murder under the YCJA would not be long enough to reflect the seriousness of the offence and Mr. Z.'s role in it. Proper accountability requires a more substantial sentence than the YCJA can provide, in my opinion.

585 On the question of rehabilitation, I do not question Mr. Z.'s sincerity about pursuing changes in his life. However, Dr. Bartel, the most careful of the experts, described Mr. Z. as only "possibly" a much lower risk than previously, noted the role that house arrest has played in the process, and conceded that it cannot be determined whether any of these changes "are sustainable in the long term". Although Dr. Stevenson wrote more confidently about Mr. Z.'s prospects, he too accepted that it is impossible to predict whether the positive changes will endure, or to predict what his performance in the community will be on something less restrictive than house arrest. Only Dr. Ley was prepared to assert more generally that the structure of a youth sentence will meet Mr. Z.'s rehabilitation needs.

586 Mr. Z. had received no treatment or therapy since his involvement with a counsellor to deal with addiction issues while he was in youth custody. He has serious, long-term issues with substance abuse, antisocial attitudes, and ADHD and is said to be in need of one-on-one psychotherapy. He was, the experts agree, an extremely high risk to reoffend violently at the time of the offence. Self-improvement measures such as eating in a more healthy manner and embracing spirituality, which Dr. Ley gives some weight to, are not the equivalent of intensive professional assistance that he so clearly needs to address these entrenched problems. (Interestingly along those lines, Mr. Z. still felt comfortable self-medicating with his mother's Xanax to cope with the stress of testifying at trial. This was an interruption of his abstinence under situational pressures, the significance of which was not really remarked on in the reports, beyond reporting that it occurred.)

587 At the time he spoke to the experts, if he breached his house arrest his electronic monitoring bracelet would go off, he would be arrested, and likely detained. Until that level of control was imposed he was breaching his curfew at will, orchestrating his parents' cooperation, continuing to see his criminal associates and continuing to receive some of the proceeds of his former drug operation. I think what the period between his breach and the writing of the reports really shows is that he functions well in the electronic equivalent of imprisonment. It is no coincidence that all of the experts, even Dr. Ley who expresses greater confidence in Mr. Z.'s rehabilitation prospects, mention the need for intensive monitoring and swift responses to any non-compliance during the community portion of his sentence.

588 Another real concern I have on the issue of rehabilitation is that none of the psychological and psychiatric opinions come to grips with Mr. Z.'s bizarre description of the flash of insight that he says he achieved at the moment that he had just stabbed Mr. Gordic. Aside from contradicting his claim to have no memory of the offence, which for some reason the experts continue to accept despite this inconsistency, it raises serious issues about what mental processes accompanied the murder. If it is taken

at face value, he experienced some sort of epiphany at the point of taking Mr. Gordic's life. If it is a reconstruction, he has chosen to attribute those disturbing thoughts to himself as the state of mind that accompanied the killing. In either case, we are left none the wiser about the implications of such a real or attributed mental state for his commission of future violent acts.

589 Mr. Z.'s counsel is correct that Ms. Jokai expressed Corrections' approval of the IRCS plan in terms of there being reasonable grounds to believe that it will reduce the risk of a further violent offence being committed by Mr. Z. Moderating that assertion is Dr. Bartel, who was prepared to say in his IRCS report only that "it is difficult to determine with any certainty that treatment/intervention might reduce risk", that addressing ADHD and substance abuse might "theoretically" do so and that "there is a possibility that his risk for violence can be significantly lowered". Although more optimistic about the benefits of the resources available under an IRCS, Dr. Stevenson made the insightful observation that despite the importance of addressing substance abuse and ADHD, Mr. Z.'s criminal and violent behaviours did not "stem directly" from those conditions. ADHD may have been a "background amplifier" and substances helped him to cope with negative feelings, but they were not the primary motivations for engaging in such conduct themselves. In other words, two of the key areas to be targeted by an IRCS may not be the key motivations for his offending.

590 Although it is far from determinative on this issue, it is also noteworthy that Corrections suspends IRCS funding during the federal portion of youth sentences, which seems to me to be a clear indication that they regard federal correctional programming to be its equivalent.

591 To be clear, I am not denigrating Mr. Z.'s reformed attitude, which does him great credit, nor the potential benefits of intensive resources to his eventual rehabilitation. I just have no confidence on the available evidence that his rehabilitation and reintegration into society in any reasonable manner with regard to risk can be accomplished within the parameters of a youth sentence. Suggestions that it can be, especially Dr. Ley's confident assertions, seem to represent more of a leap of faith than a reasoned consideration of that evidence.

c. Conclusion

592 Mr. Z. will receive an adult sentence.

B. Length and Type of Sentences

1. A.S.D. and G.C.A.R.

593 While there are important distinguishing features between these offenders, which I will describe, there are enough common ones to make it beneficial to address the length and structure of their sentences together.

594 In addition to s. 3(1)(b)(ii), which I have previously described in the context of the test for an adult sentence, the general principles in s. 3(1) of the YCJA that are most applicable to the youth sentences to be imposed here are:

- * the requirement of young persons' accountability through measures proportionate to the seriousness of the offence and their degree of responsibility (s-s. (a)(i));
- * the promotion of rehabilitation and reintegration (s.-ss.(a)(ii) and (b)(i); and

- * the need for the measures taken against them to, among other objectives, promote societal values and be meaningful to them individually (s-ss. (c)(i) and (iii)).

595 The provisions of s. 38, which I have also previously described in the context of the test for an adult sentence, obviously govern the actual sentences to be imposed as well.

596 Finally in terms of relevant YCJA provisions, committal to custody is permitted in this case by s. 39 (1)(a), because Mr. D. and Mr. R. have committed violent offences.

597 As I have explained in the section on youth vs. adult sentences, this is a very serious offence and the degree of responsibility of both offenders is high. Both were integral participants in the assault that they joined, although it became manslaughter through Mr. Z.'s escalation of the violence involved. The actual degree of harm intended by them was less than the irreparable and tragic harm that ensued. Although, as I have said, they assumed a risk when they participated that something more serious than a beating would be inflicted by another participant, there is no suggestion that they knew or intended what Mr. Z. would do, as their manslaughter charge and conviction reflect.

598 They have no previous criminal records and spent only short periods of time in custody before achieving their release.

599 Each of them has a significant aggravating feature in relation to the offence: Mr. D.'s efforts to locate Mr. Gordic and Mr. R.'s possession of a knife at the scene.

600 They also have extensive mitigating factors: strong family and community support; full compliance with restrictive bail for an extended period; sufficient remorse within the bounds of their positions regarding their conviction; strong community service or work histories; and expert opinions that they are low risks to reoffend and have excellent rehabilitation prospects.

601 Given the seriousness of the offence and their degree of responsibility, I have concluded that no sentence short of a committal to custody will be proportionate to those factors. In my opinion nothing less would constitute a just sanction, with meaningful consequences to hold them accountable. In particular, I have concluded that custody is necessary to (1) promote a sense of responsibility in them and an acknowledgment of the harm they have done and (2) denounce the dangerous tendency of some members of society, often intoxicated groups of young males, to assault outnumbered and defenceless victims.

602 I am not convinced that either offender requires significant specific deterrence. Despite their ongoing protestations of innocence, it seems clear that they nevertheless strongly desire to avoid any of the associations or behaviour of the type that led them into this terrible situation.

603 In concluding that custody is necessary, I am in no sense disregarding the opinions of the experts that associating with more experienced and older offenders may undermine Mr. D. and Mr. R.'s rehabilitation. Laudable as it is, that concern cannot displace entirely the pressing sentencing objectives here. In addition, I have some confidence that, even in the adult provincial system, their classifications can be approached in a way that is sensitive to the recommendations in the reports.

604 The length of the custody periods will be moderated to be the least restrictive ones needed to provide meaningful consequences and the most likely ones, in the context of my conclusion that custody must be imposed, to achieve rehabilitation and reintegration. A period of community supervision is then essential to support the strong rehabilitation prospects described in the reports.

605 While I agree that Mr. R.'s possession of the knife is slightly more aggravating than Mr. D.'s role in searching for Mr. Gordic, Mr. R.'s attitude towards his involvement in the offence and future prospects are slightly more positive than Mr. D.'s, so overall I find them to be in comparable positions with respect to the sentence to be imposed.

606 There are not a large number of closely comparable manslaughter cases in this particular region, but looking more broadly, as the cases that I have been referred to reveal, where the moral blameworthiness of the offenders is at this level, sentences have been imposed that involve periods of custody in the one to two year range.

607 I have decided not to accede to the submission by Mr. D.'s counsel to reduce his sentence to reflect the harassment and abuse that he has suffered by those who are allied with Mr. Gordic's cause. As Justice Moldaver expressed it in *Suter*, dealing with an offender who had been attacked by a vengeful mob and had one of his fingers cut off:

[57] As such, the violence suffered by Mr. Suter at the hands of non-state vigilante actors can be considered when determining an appropriate sentence. The violent attack was related to Mr. Suter's role in Geo Mounsef's death, and both the permanent physical injury and psychological trauma resulting from this attack necessarily form part of Mr. Suter's personal circumstances. In light of the sentencing principles of individualization and parity, the vigilante attack against Mr. Suter was a relevant collateral consequence to consider at sentencing.

[58] That said, this particular collateral consequence should only be considered to a limited extent. Giving too much weight to vigilante violence at sentencing allows this kind of criminal conduct to gain undue legitimacy in the judicial process. This should be avoided. Vigilantism undermines the rule of law and interferes with the administration of justice. It takes justice out of the hands of the police and the courts, and puts it into the hands of criminals. As a general rule, those who engage in it should expect to be treated severely.

[59] In sum, the sentencing judge was entitled to consider, to a limited extent, the vigilante violence suffered by Mr. Suter for his role in Geo Mounsef's death. As such, the Court of Appeal erred when it refused to give any effect to it.

608 The behaviour to which Mr. D. and Mr. R. and their families have been subjected is deplorable and has to be condemned in the strongest possible terms, as Moldaver J. described. But deplorable as it may be, I do not think it rises to the level contemplated in *Suter*, as something that can be taken into account when determining an appropriate sentence. Although there was a reference by counsel during the trial to a shoving incident in a courthouse washroom during a break, the sheriffs' inquiries concerning the circumstances proved inconclusive. Other than that there is nothing reliably documented in the reports as "violence" as *Suter* envisions. However, I certainly took into account the emotional effects on Mr. D. and Mr. R. that were caused by this kind of harassment and intimidation carrying on for three and half years when I was considering whether their sentence needs to reflect any specific deterrence.

609 Bearing in mind all of these matters, pursuant to s. 42(2)(o) of the YCJA I impose custody and supervision orders on Mr. D. and Mr. R. for three years, consisting of a continuous period of custody of 18 months and a period of conditional supervision pursuant to s. 105 of 18 months. The conditions of their conditional release will be set pursuant to s. 105(1) prior to their release.

2. L.Z.

610 Pursuant to s. 745(1)(c) of the Criminal Code I sentence Mr. Z. to life imprisonment without eligibility for parole for seven years.

C. Ancillary Orders

1. A.S.D. and G.C.A.R

611 Pursuant to s. 487.051(1)(a) of the Criminal Code they will both provide the number of samples of bodily substances that are reasonably required for the purposes of forensic DNA analysis.

612 Pursuant to s. 59(2) of the YCJA, I prohibit them from possessing any of the items set out in s-s (1) for life.

613 Pursuant to s. 743.21 of the Criminal Code, during the custodial portion of their sentences they are prohibited from communicating, directly or indirectly, with the witnesses listed in their bail conditions, a list of which I have provide to the clerk of the court to be incorporated into the order.

614 No further order is required in order for the ban on the publication of the identity of these two offenders to remain in place pursuant to s. 110 of the YCJA. None of the circumstances displacing the ban have occurred.

615 Finally, pursuant to s. 119(1)(g)(ii) of the YCJA the psychological and psychiatric reports prepared with respect to Mr. D. and Mr. R. may be released to youth and adult probation officers, who are "peace officers" within the meaning of s. 119(1)(g), to assist those officers in administering this case during the term of Mr. D. and Mr. R.'s youth sentences. In addition, notwithstanding their exclusion by s. 119(6) from the classes of persons who normally have access to the reports, I am satisfied that, pursuant to the exception in s. 34(7)(b)(ii), the reports may also be provided to the provincial director and the director of any provincial correctional facility for adults at which Mr. D. and Mr. R. may serve their sentences. In my opinion, withholding the reports "would jeopardize the safety" of Mr. D. and Mr. R. themselves, as s. 34(7)(b)(ii) requires, by depriving those Corrections officials of crucial information about their recommended classifications, with particular regard to the dangers expressed in the reports of their victimization by older and more criminally-entrenched inmates.

2. L.Z.

616 Pursuant to s. 487.051(1)(a) of the Criminal Code he will provide the number of samples of bodily substances that are reasonably required for the purposes of forensic DNA analysis.

617 Pursuant to s. 109(1)(a) of the Criminal Code I prohibit him from possessing any of the items set out in s-s (1) for life.

618 Pursuant to s. 743.21 of the Criminal Code during the custodial portion of his sentence, he will have no contact with the witnesses listed in his bail conditions, a list of which I have provided to the clerk of the court, except that, given his renewed relationship with the former girlfriend who witnessed the attack, as described in the reports, he may have contact with her.

619 In the usual course Mr. Z.'s name could now be published, pursuant to s. 110(2)(a) of the YCJA, because he has received an adult sentence. However his counsel has asked for an order suspending that effect until the expiration of the appeal period, which I will grant. The Court of Appeal has granted a

publication ban pending appeal in at least one case to which s.110 applies (R. v. F.M., [2007 BCCA 393](#)) and Mr. Z. should at least have the opportunity to make that application.

620 Section 117 of the YCJA, provides that the sections governing the disclosure of records do not apply to a young person who receives an adult sentence, "once the time allowed for the taking of an appeal has expired or, if an appeal is taken, all proceedings in respect of the appeal have been completed and the appeal court has upheld an adult sentence." After those events, Mr. Z.'s records would be accessible in the same way as those of an adult offender. However s. 34(7)(b)(ii) continues to apply and because I am satisfied that his safety would be jeopardized by the psychological and psychiatric reports being withheld from those who are managing his incarceration, for the same classification concerns that arise in Mr. D. and Mr. R.'s cases, I will order that the reports may be released to the director of the penitentiary at which he is serving his sentence.

T.A. SCHULTES J.

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- 1** I implicitly accepted this in my reasons for judgment, but it was not necessary to make a direct finding at that point.
 - 2** Dr. Stevenson referred to the weekend of the offence also being Mr. Z.'s first "full" nights away from home, but given the extent of his criminal activities outside of the home in the preceding years it is probably not as meaningful a step as it was for the other offenders
 - 3** The Crown also gave very detailed replies to the defence submissions. In an effort to be more concise I have included the key points of their replies in my summaries of their principal submissions.