C65766

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

KEVIN MORRIS

Respondent

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PART I. STATEMENT OF THE CASE

[1] This appeal against sentence concerns the appropriate sentence for a youthful, first time offender found guilty of possession of a loaded illegal handgun. Illegal possession of firearms is one of the most serious problems facing urban centers in Ontario as the human cost of firearm offences is often immeasurable. Well-informed, fair-minded and reasonable members of our diverse community have their attention focused on our Court's treatment of such offenders. The facts of this case fall squarely within the "true crime" end of the spectrum for firearm offences: the respondent fled from police when they approached him and discarded the gun before being apprehended. An exemplary sentence was necessary given the danger that firearms pose to Canadian society and the need to denounce and deter such conduct and to protect the public. This sentence imposed here fails to do so.

[2] On June 28, 2017, a Toronto jury found the respondent guilty of three firearm offences: 1) possession of an unauthorized firearm, 2) possession of a prohibited firearm with ammunition, and 3) carrying a ***concealed*** weapon. The respondent was carrying a loaded, concealed handgun in a public place. On July 19, 2018, Nakatsuru J. sentenced the respondent to 12 months imprisonment. The Crown seeks leave to appeal and, should leave be granted, appeals from sentence imposed by Nakatsuru J. on the basis that he committed errors in law and principle, and imposed a manifestly unfit sentence. The errors stemmed, in large part, from the sentencing judge's overwhelming focus on systemic racism. While systemic racism demands judicial attention, and is a relevant sentencing factor in this case, it cannot eclipse the controlling sentencing principles for firearm offences, particularly those on the true crime end of the spectrum. Social context evidence cannot justify the imposition of a manifestly unfit sentence.

[3] The appellant submits that: (a) the sentencing judge imposed a manifestly unfit sentence. This error, own its own, warrants intervention from this Court. The sentence should have been at least three years. The appellant further submits that the sentencing judge also committed the following additional errors, each of which materially impacted the sentence imposed:

(b) Errors in his treatment of social context evidence of racism
(c) Errors in his treatment of aggravating and mitigating factors
  i. The respondent's flight from police
  ii. The respondent's ditching of the gun.
  iii. The respondent's purpose and use of the gun
  iv. The respondent's mental health
  v. Erroneous mitigation for a *Charter* breach
(d) Delay in sentencing and pre-sentence custody

[4] This case provides an opportunity for this Court to develop a clear analytical framework that provides guidance to trial judges on *how* systemic and background factors may be properly applied to the sentencing of racialized, non-Indigenous offenders. Recent cases in Ontario and other provinces have grappled with this issue but have provided mixed and inconsistent results. The appellant will make submissions on this broader issue in part (e) of this factum.

PART II. SUMMARY OF THE FACTS

(a) The Offences

[5] On December 13, 2014, several officers responded to a police radio dispatch concerning a home invasion robbery in the area of Victoria Park & Eglinton in Toronto. The victim of the robbery reported it approximately 20 minutes after it happened, and described the robbers as four Black men. The respondent is a Black man. He is a first-time offender and was 22 years-old when he committed his offences.

Appeal Book, Reasons for Sentence, at p. 225 (paras. 2-3)
Sentence Proceedings (July 19, 2018), Vol. 12, at p. 57, ll. 3-5

[6] D.C. Moorcroft and D.C. Graham were among the officers who responded to the dispatch. They were dressed in plainclothes and were driving unmarked vehicles. As they neared the address where the robbery took place, they observed four Black men walking towards a car in a parking lot. The respondent, who was wearing a jacket, was one of them. The officers approached the group and identified themselves as police officers. The respondent fled. He was the only one of the four to do so. He was accidentally struck in the foot by D.C. Moorcroft's vehicle while fleeing.

> *Appeal Book*, *R. v. Morris*, 2017 ONSC 4298 (hereafter "Charter Decision"), at pp. 182, 184-185, 188 (paras. 5, 14, 19, 37)
> *Appeal Book*, *R. v. Morris*, 2018 ONSC 5186 ("Reasons for Sentence") at p. 225 (para. 3)

[7] The respondent got up and continued to run. Three additional officers observed him climb over a fence, jump down into a parking lot of a shopping mall, and duck into stairwell next to a No Frills grocery store. When he emerged from the stairwell, he was no longer wearing his jacket. He was pursued by P.C. Faduck and ultimately apprehended. P.C. Faduck retrieved the respondent's jacket from the stairwell. A .38 caliber Smith and Wesson revolver loaded with 5 live rounds of ammunition was located in the jacket pocket.

> *Appeal Book*, Ruling on Charter Application, at pp. 184-185 (paras. 13, 19)
> *Appeal Book*, Exhibit V and S on Charter Motion (Gun Photograph), at pp. 219, 221
> *Appeal Book*, Exhibit J on Charter Motion (No Frills Photograph), at p. 213
> *Appeal Book*, Exhibit N on Charter Motion (Stairwell Photograph), at p. 215
> *Appeal Book*, Exhibit 10 in Trial Proper (Google Maps Photograph), at p. 223
> *Appeal Book*, Reasons for Sentence, at p. 225 (para. 3)
> *Sentence Proceedings (July 19, 2018)*, Vol. 12, at p. 49, ll. 24-33

(b) The Respondent's Stay Application

[8] The respondent sought a stay of proceedings at trial on the basis that the police violated his rights under ss. 7, 9 and 10 of the *Charter*. The judge found no s. 9 violation. He did find a violation of s. 7 arising from the respondent being struck by Moorcroft's police vehicle, and a violation of 10(b) arising from the police having questioned the respondent after he had asked to

speak to a lawyer. With respect to the 10(b) violation, the judge observed that the questions posed by the police were relatively innocuous, that none of the answers assisted the police in furthering their investigations and that the Crown did not seek to tender any of the respondent's statements at trial. With respect to s. 7, the judge found:

> **36** What I find occurred is that the applicant was in fact running. The officer was going fast through the lot to try and stop him from getting away. He could see the applicant running. As they intersected, the applicant made a sudden turn to the north. The officer struck the applicant. The applicant did not run into a stopped vehicle. Rather, the two came together suddenly and unexpectedly. The front of the vehicle (driver's side) struck the applicant's legs and then ran over his left foot.
>
> **37** However, this was not a deliberate attempt to run down or strike the applicant. While the injury suffered was serious, had this been the officer's intent, the injuries would have been more catastrophic. Rather, the officer was trying to cut the applicant off at the pass, so to speak. But given the speed of the applicant and his sudden move, the officer miscalculated. He drove to prevent the applicant from fleeing. But the officer did not intend to strike him. The contact between vehicle and man was therefore accidental in my view. But the actions of the officer were deliberate.

Appeal Book, Ruling on Charter Decision, at pp. 181, 185-188, 192-193 (paras. 1, 20, 24-25, 30, 36-37, 59, 65)
Appeal Book, Affidavit of Kevin Morris, at p. 196

(c) Delay in Sentencing

[9] The sentencing hearing did not take place until July 19, 2018, over a year after conviction, because of a series of adjournments at the respondent's request. The sentence hearing was first scheduled for September 27, 2017 to allow time for a pre-sentence report ("PSR"). On that date a PSR had been prepared and the Crown was ready to proceed with sentencing. However, the respondent sought an adjournment to explore a global resolution involving a new set of charges that he incurred while on release for these present offences. The new set of criminal charges related to a home invasion robbery in Brampton. The sentence hearing was adjourned to October 13, 2017.

Appeal Book, Reasons for Sentence, at p. 225
Appeal Book, Information on Brampton Charges (April 4, 2017), at p. 28
Proceedings at Trial (June 27 and 28, 2017), Vol. 1, at p. 99, l. 15 – p. 103
Sentence Proceedings (September 27, 2017), Vol. 2, at p. 1 – p. 3, l. 25; p. 6, ll. 30-3

[10] When the matter came back before the court for sentencing on October 13, 2017, the respondent sought a "significant, lengthier adjournment" to prepare materials that would examine "socio-cultural factors and their impact on individual offenders". The matter was adjourned to October 19, 2017. Thereafter, a series of adjournments were granted for the respondent to obtain Legal Aid Ontario funding for expert reports and for the experts to prepare their reports. The respondent filed a Notice of Expert Evidence on April 30, 2018. The sentencing hearing ultimately took place on July 19, 2018.

> *Sentence Proceedings (October 13, 2017)*, Vol. 3, at p. 3, ll. 15-30; p. 15, ll. 17-24
> *Appeal Book*, Notice of Expert Testimony, at p. 40
> *Sentence Proceedings (July 19, 2018)*, Vol. 12, at p. 1

(d) The "Expert" Evidence

[11] The respondent tendered two "expert" reports related to systemic racism at the sentencing hearing. The first report was titled "Expert Report on Crime, Criminal Justice, and the Experience of Black Canadians, in Toronto, Ontario" ("First Report"). It was authored by Professors Akwasi Owusu-Bempah and Carl James. This report analyzed the history of anti-Black racism in Toronto. The second report was titled "The Social History of Kevin Morris" ("Second Report") and was authored by a social worker Ms. Camisha Sibblis. This report sought to draw a relationship between anti-Black racism and the respondent's life experience. Apart from Ms. Sibblis's opinion about the impact of systemic racism on the respondent's life, this second report offered only slightly more factual information than the original PSR.

> *Appeal Book*, Reasons for Sentence, at p. 227-228 (paras. 13-18)

[12] As set out in its Notice of Response, the Crown requested a "*voir dire* with respect to the qualification of the proposed experts and a determination of the admissibility of the proposed expert evidence". The Crown took the position that the ***first report was unnecessary*** because the

existence of systemic racism and anti-Black racism in society generally is already acknowledged by all levels of court. As to the second report, authored by Ms. Sibblis, the Crown objected to its admissibility without first having a *voir dire* to determine the *scope of her proposed expertise* and *qualifications*. Alternatively, the Crown suggested that her report be filed as her evidence in chief, her opinion evidence *redacted*, and that she be subjected to cross-examination. The sentencing judge summarily dismissed the Crown's request for a *voir dire*, without calling on the defence to respond. He permitted the Crown to cross-examine Ms. Sibblis on the content of her opinion, but refused to redact her opinion.

> *Appeal Book*, Notice of Response, at p. 43 (original: p. 2)
> *Sentence Proceedings (July 19, 2018)*, Vol. 12, at p. 2, l. 12 – p. 9, l. 32

[13] The report prepared by Ms. Sibblis was based on interviews with the respondent, his mother, pastor, and a family friend. Interestingly, the author of the PSR had previously made numerous efforts to interview the respondent's family members, without success. Ms. Sibblis also reviewed a selection of medical and school documents. Her report identified various challenges the respondent faced in his life, including: poverty, insufficient support for learning challenges experienced during his education, the absence of a male role model figure, his growing up in a high-crime neighbourhood, and not receiving adequate mental health support during traumatic life events.

> *Appeal Book*, Social History of Kevin Morris, at pp. 158, 161, 171-173, 175 (original: pp. 2, 5, 15-17, 19)
> *Appeal Book*, Ministry Pre-Sentence Report, at p. 205 (original: p. 3)

[14] In general, Ms. Sibblis concluded that the specific impact of systemic racism on the respondent's life was as a contributing factor to the challenges that he faced with respect to his education, socioeconomic status, and social integration. Ms. Sibblis stated in her conclusion that, "[h]is overall social circumstances, while not excusing his behaviour, have undeniably

contributed to the respondent being involved with the justice system today." There was no qualitative analysis of how this contribution took place, nor any quantification of how much or to what degree.

Appeal Book, Social History of Kevin Morris, at p. 175 (original: p. 19)

[15] The Crown submitted that because the dominant sources of information in Ms. Sibblis's report was the respondent and those close to him, the portions of her opinion that were based on specific factual propositions merited little if any weight absent independent corroboration. For example, Ms. Sibblis relied on the respondent and his mother's account of their experience with the Children's Aid Society (CAS) to conclude that anti-Black racism contributed to CAS involvement in the respondent's life. However, Ms. Sibblis did not any make inquiries designed to test the truth or extent of that claim, nor did she examine any records from the CAS to support that conclusion, or interview CAS people or anyone not on the respondent's list.

Sentence Proceedings (July 19, 2018), Vol. 12, at p. 25, l. 30 – p. 26, l. 24; p. 48, l. 11 – p. 49, l. 23

(e) Positions of the Parties

[16] The Crown's position on sentence was that four to four-and-a-half years was a fit and appropriate sentence. The Crown's position was based on the aggravating features of the offence, the absence of remorse, and the applicable sentencing jurisprudence, including firearm sentencing cases involving youthful first offenders. The Crown emphasized that the offences were on the "true crime" end of the spectrum and that the respondent:

- Was carrying a loaded and concealed firearm in public with five live rounds of ammunition.
- Had no business possessing a firearm anywhere or any time.
- Discarded a loaded firearm in a public place, namely the Golden Mile Plaza, while attempting to evade the police.
- Created a significant danger for himself, the police and for the public
- Attempted to get rid of it in a manner that suggests he knew what he was doing
- Did not express remorse or take responsibility for his actions.
- Was not entitled to mitigation for a guilty plea.

The defence position was that a sentence of 13 months minus 1 month for the *Charter* breaches was a fit and appropriate sentence having regard to the impact of systemic racism on the respondent.

> *Sentence Proceedings (July 19, 2018)*, Vol. 12, at p. 43, ll. 3-8; p. 53, l. 23 – p. 54, l. 30; pp. 56-57; p. 72, ll. 8-20; p. 84, l. 30 – p. 87, l. 33

(f) The Reasons for Sentence

[17] The sentencing judge imposed a 15-month custodial sentence, in large measure on account of systemic racism. He further reduced the respondent's sentence to 12 months, after deducting **3 months** for *Charter* breaches. This too was driven by attribution to systemic racism. After accounting for pre-trial custody at a rate of 1.5, the respondent was sentenced to serve one more day.

> *Appeal Book*, Reasons for Sentence, at p. 244 (paras. 96-97)

PART III. ISSUES AND THE LAW

A. The Sentence Imposed is Manifestly Unfit.

[18] The sentencing judge characterized the overall sentence in this case as "lenient". The appellant views it differently. A 12-month sentence for a "true crime" firearm offence is beyond lenient. It is manifestly unfit. This type of offence "requires the imposition of significant sentences in order to address the goals of denunciation and deterrence and to express society's abhorrence of this increasing, extremely serious phenomenon." This Court stated in *R. v. Marshall*: "offenders who engage in s. 95 offences at the 'true crime end of the s. 95 spectrum of offences' should continue to receive exemplary sentences that emphasize deterrence and denunciation."

> *Appeal Book*, Reasons for Sentence, at p. 242 (para. 83)
> *R. v. Delchev*, 2014 ONCA 448, 323 O.A.C. 19, at para. 20
> *R. v. Marshall*, 2015 ONCA 692, 340 O.A.C. 201, at para. 47, citing *R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, at para. 206, aff'd 2015 SCC 15, [2015] 1 S.C.R. 773

[19] Further, in *R. v. Smickle*, Doherty J.A. held that when a first-time offender with mitigating personal circumstances commits a s. 95 offence falling at the "true crime" end of the spectrum, "a sentence approaching or at the maximum reformatory sentence (two years less a day)" is an appropriate sentence. The sentence imposed in this case was nearly half the sentence imposed in *Smickle.* This is despite the fact there were more aggravating factors and less mitigating factors in this case than were present in *Smickle*, including the respondent's ditching of the loaded gun in public and flight from police. The respondent's case is more comparable to

R. v. Nur, where this Court and the Supreme Court upheld a 40-month custodial sentence for a 19 year-old first offender who pleaded guilty and had good rehabilitative prospects.[1]

> *R. v. Smickle*, 2013 ONCA 678, 304 C.C.C. (3d) 371, at para. 30
> *R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, at paras. 6, 17-23, aff'd 2015 SCC 15, [2015] 1 S.C.R. 773

[20] The appellant acknowledges that where a sentencing judge has given reasons that *warrant* a sentence outside the normal range that sentence may be upheld by a reviewing court. The appellant submits that *these reasons* do not warrant a sentence so far beyond the range for true crime firearm offences and should attract *no deference* from this Court.

[21] The appellant also acknowledges that the sentencing judge properly accepted that *some* of the *Gladue* principles are applicable to non-Indigenous racialized offenders who hail from groups that have been the subject of centuries long discrimination; indeed, there is nothing in the *Gladue* decision that would foreclose background and systemic factors from consideration at sentencing for non-Indigenous offenders.[2] Nor is there anything wrong with a court properly receiving and considering social context evidence. Social context evidence aids a better understanding of the offender and the circumstances that led to the offence. But it does not operate as an excuse or justification for criminal conduct, does not create a race-based sentencing discount, and does not mandate remedying the issue of over-incarceration of Black people by artificially or arbitrarily reducing incarceration rates, especially for gun crimes.

> *R. v. Gladue*, [1999] 1 S.C.R. 688, at paras. 64, 69

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[1] See also: *R. v. Mansingh*, 2017 ONCA 68, 136 W.C.B. (2d) 16 (Ont. C.A.), at paras. 21-25: this Court upheld a 43-month custodial sentence for a young-first time offender, holding that such a sentence such a sentence was particularly appropriate in the context of an offender who "fled the police while armed with a loaded handgun" and "threw that loaded weapon away in a place where it could easily have been found". *R. v. Harutyunyan*, 2012 ONSC 58, at paras. 1, 9-12, 26 aff'd 2012 ONCA 637, 104 W.C.B. (2d) 416 (Ont. C.A.): this Court upheld a four-year custodial sentence for a youthful offender with no criminal record and who undertook pro-social activities while out on bail.

[2] At para. 69, Cory and Iacobucci JJ. state that "background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender".

[22] Section 718.2(e) of the Code serves as a "direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, ***to the extent that a remedy is possible*** through the sentencing process". Here, the sentencing judge's focus on systemic racism in this case dominated his entire approach and led to the imposition of a woefully inadequate sentence. The sentencing judge overemphasized a relevant factor and allowed it to eclipse other relevant sentencing considerations. The degree to which systemic and background factors affected the respondent, if at all, does not warrant the sentence imposed. The need for public protection, and deterrence and denunciation in this case demanded far greater weight than that given by the sentencing judge.

[23] In *R. v. F.H.L.*, this Court provided some guidance on how systemic and background factors are relevant at sentencing, observing that a "different method of analysis does not necessarily a mandate a different result" and that "crafting a just and appropriate sentence may, in some cases, require giving greater weight to sentencing objectives such as deterrence and denunciation." This Court has also repeatedly recognized that, "the increase in gun violence…requires the imposition of significant sentences in order to address the goals of denunciation and deterrence and to express society's abhorrence of this increasing, extremely serious phenomenon."

> *R. v. F.H.L.*, 2018 ONCA 83, 360 C.C.C. (3d) 189, at para. 47
> *R. v. Delchev*, 2014 ONCA 448, 323 O.A.C. 19, at para. 20

[24] The appellant recognizes that the sentencing judge relied upon a number of firearm sentencing cases in support of the 12 month sentence he imposed, however those cases are readily distinguishable. As summarized in chart format in Appendix I, all of them involved either a guilty plea, significant mitigating factors that are absent here, or unique factual circumstances that distinguish them from the "true crime" end of the spectrum.

Appeal Book, Reasons for Sentence, at p. 241 (para. 81)

B. Error in Treatment of Social Context Evidence of Racism

[25] Sentencing judges should not be denied the opportunity to obtain relevant information by the imposition of restrictive rules. A sentencing judge is entitled to the broadest range of *relevant* material for purpose of imposing *fit* sentence and may accept hearsay evidence if it is credible and trustworthy. On the other hand, this relaxed evidentiary standard at a sentencing hearing does not obviate procedural rights required to ensure fairness and the reliability of the evidence tendered. For example, even though hearsay is admissible at a sentencing hearing, pursuant to s. 723(5) of the *Criminal Code*, and an offender's hearsay accounts relating to sentencing issues are routinely included in Pre-Sentence Reports, the hearsay must be "credible and trustworthy", at least to some degree, before it can be given any weight.

Criminal Code, RSC 1985, c C-46, s. 723(5)
R. v. Angelillo, 2006 SCC 55, [2006] 2 S.C.R. 728, at para. 20, citing *R. v. Gardiner*, [1982] 2 S.C.R. 368, at pp. 414, 416
R. v. Albright, [1987] 2 S.C.R. 383, at p. 391-392
R. v. Rudyk (1975), 11 N.S.R. (2d) 541 (N.S. C.A.)
R. v. Urbanovich and Brown (1985), 19 C.C.C. (3d) 43 (Man. C.A.)

i. Ms. Sibblis' evidence

[26] As noted, the respondent filed a Notice of Expert Evidence and the Crown filed a Notice of Response seeking a *voir dire* on the basis that, *inter alia*, the qualifications of Ms. Sibblis, and scope of her evidence and expertise had not been defined. It was unclear what the expert opinion of Ms. Sibblis was and therefore impossible to fairly determine what if anything she was properly qualified to give an "expert" opinion on.

> *Appeal Book*, Notice of Expert Testimony, at p. 40
> *Appeal Book*, Notice of Response, at pp. 42-43

[27] The sentencing judge's approach to this threshold issue departed from the approach taken by other judges in dealing with similar evidence. For example, in *R. v. X*, Robert Wright was proposed as an expert witness by the defence to testify about race and cultural factors relating to a young offender. The Crown opposed and a *voir dire* was conducted. Derrick J. ultimately ruled that Mr. Wright was qualified to give opinion evidence because he had acquired special or peculiar knowledge through both study and practical training and experience and possessed "special knowledge and experience". Mr. Wright was permitted to provide opinion evidence in four defined areas. This is what ought to have occurred in the case at bar.

> *R. v. X*, 2014 NSPC 95, 353 N.S.R. (2d) 130, at paras. 163, 176
> *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at paras. 23-24
> *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-24
> *R. v. Esseghaier*, 2015 ONSC 5855, 125 W.C.B. (2d) 232, at paras. 45-46

ii. Under-emphasizing the respondent's moral agency

[28] Manifestations of systemic racism are inevitably present in the lived experience of nearly every racialized person. While potentially relevant to the issue of moral blameworthiness, evidence of systemic racism generally does not oust the need for a proper evidence-based assessment of moral blameworthiness, one that is centered on the principle of individual moral

agency. The "expert" evidence adduced about the respondent's life experience in this case did not demonstrate that he was deprived of a meaningful moral choice to carry a concealed loaded gun in public.

Appeal Book, Reasons for Sentence, at p. 240 (paras. 74)

[29] In *R. v. Hamilton*, for example, this Court held that the consideration of systemic and background factors cannot override an offender's moral choice to commit an offence in determining a proportionate sentence. The sentencing judge departed from this important principle and precedent. It is reasonable that the sentencing judge found that: systemic racism "negatively impacted" the opportunities available to the respondent; that the respondent lived in a poor neighbourhood; and that school was difficult for him. However, those findings do not support the sentencing judge's ultimate conclusion that it was "understandable" that the respondent could think "I will have that gun". Apart from concerns regarding negative stereotypes about young Black men in high crime areas, this conclusion was unreasonable on the evidence.[3] As Doherty J.A. put it in *Hamilton*, "[o]ur criminal law rejects a determinist theory of crime".

R. v. Hamilton (2004), 72 O.R. (3d) 1 (Ont. C.A.), at para. 140
R. v. Brissett and Francis, 2018 ONSC 4957, 149 W.C.B. (2d) 680, at paras. 68-69
R. v. Gabriel, 2017 NSSC 90, 37 C.R. (7th) 206, at paras. 52, 53, 57, 70, 83-84, 125-129
Appeal Book, Reasons for Sentence, at pp. 240-241 (paras. 74-78)

[30] An appropriate consideration of the impact systemic racism has on a racialized offender's *choice* to commit a crime must be careful and measured. It must avoid the undesirable consequence of creating legal precedent that draws a causal link between race and criminal propensity. Such reasoning is sentencing by stereotype. It is dangerous, offensive and wrong. Yet, the sentencing judge – quite unintended no doubt – went further with respect to the

[3] It also creates a potential heightened risk to members of the public who live in these areas.

respondent by effectively finding that systemic and background factors created a *fait accompli* for the offences the respondent chose to commit. This was reasoning based on generalized assumptions, not specific evidence.

Appeal Book, Reasons for Sentence, at p. 240 (para. 78)

[31] In aggregate, while a measured and moderate reduction in moral blameworthiness *could potentially* flow from these factors, the unmeasured wholesale reduction attributed to the respondent was a serious error that had a material impact on the sentence. To the extent that systemic racism contributed to some of the challenges the respondent experienced in his life, these factors ought to have been weighed alongside the real agency that the respondent exercised in possessing a loaded gun, fleeing from the police, and ditching the gun in a public place.

Appeal Book, Reasons for Sentence, at p. 240 (para. 74)

C. Errors in Treatment of Aggravating and Mitigating Systemic and Background Factors

[32] The sentencing judge strayed from well-established legal principles in his assessment of aggravating and mitigating factors. He failed to give aggravating factors their proper weight and improperly treated neutral factors as mitigating.

R. v. Lacasse, 2015 SCC 64. [2015] 3 S.C.R. 1089, at para. 49, citing *R. v. McKnight* (1999), 44 O.R. (3d) 263 (Ont. C.A.), at para. 35
R. v. McCue, 2012 ONCA 773, 299 O.A.C. 14, at para. 15

i) The respondent's flight from police

[33] For example, the sentencing judge concluded that fleeing the police was ***not a "weighty" aggravating*** factor and that "it would be wrong to punish" the respondent more severely because his actions were "based upon emotion and a state of mind that has been shaped both generally and specifically by the historical racism suffered by Blacks" and himself. On the sentencing

judge's theory, there was a "connection in the evidence" between the respondent's "act of flight and the systemic factors". There are a number of problems with the sentencing judge's reasoning.

- First, it ***distorts the actual evidence*** by finding in effect that the respondent fled because of his distrust of the police, not to escape arrest. There was no basis in the evidence to support this conclusion: the respondent did not testify at sentencing about why he fled the police.[4] The inference is that the respondent, and not his companions, ran because he possessed an illegal firearm. Yet the sentencing judge miscast the nature of the respondent's flight as impulsive and *caused* by systemic racism.

- Second, the sentencing judge *excused* the respondent's flight from police *because* of systemic factors. The sentencing judge reasoned that it was "understandable" that the respondent ran and then used the limited relevance of systemic factors as a basis to conclude that it would be "wrong to punish you [the respondent] more severely for this" [emphasis added]. This form of reasoning was prohibited in *R. v. Ipeelee*, which held that systemic and background factors "do not operate as an excuse or justification for an offence".

- Third, as a matter of policy, it is dangerous to set a precedent that an offender's distrust of the police results in a different standard for compliance with a lawful police direction. The judge concluded that: he would not punish the respondent "more severely" on account of his flight, that the sentencing objectives normally raised by the act of flight were "tempered", and that the moral blameworthiness of the respondent's actions was "lessened" as a result. This is wrong. The fact that legitimate social challenges can lead to distrust between certain groups and law enforcement does not diminish the responsibility of all persons to comply with a lawful police direction.

Appeal Book, Reasons for Sentence, at p. 238 (para. 66)
R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 218
R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 83
R. v. F.H.L., 2018 ONCA 83, 360 C.C.C. (3d) 189, at para. 47

ii) The respondent's ditching of a gun in a public place

[34] The sentencing judge minimized the respondent's act of ditching his gun in a public place by improperly relying on the ***manner*** in which the gun was ditched. The sentencing judge found:

[4] It is of note that in his application for a stay of proceedings at trial based on a *Charter* breach, the trial judge found Mr. Morris's account of the events surrounding the police chase lacked credibility, see *Appeal Book*, Charter Decision, at p. 183 (para. 11).

> I note that the gun was not thrown away into a place that was easily accessible to passersby or innocents. It was left in an unused stairwell, concealed in a jacket, amidst a pile of debris and water.

The respondent discarded his firearm in an access stairwell in a public parking lot outside a grocery store in the middle of Toronto. The trial judge's reasoning is contrary to this court's holding in *McCue*: an offender "gets no credit for throwing the gun away while attempting to avoid capture."

> *Appeal Book*, Reasons for Sentence, at p. 238 (para. 65)
> *R. v. McCue*, 2012 ONCA 773, 299 O.A.C. 14, at para. 15

iii) The respondent's purpose and use of the gun

[35] When assessing *why* the respondent possessed a loaded, illegal firearm, the sentencing judge emphasized that there was no evidence that the respondent acquired the gun to "commit a crime" and that the need to denounce his offences was ***reduced*** by the fact the gun was not used "at all in a bad way". By relying on these considerations in the context of mitigation, the sentencing judge erred by confusing the absence of an aggravating factor with the presence of a mitigating factor.

> *Appeal Book*, Reasons for Sentence, at pp. 240-241 (paras. 75, 78)
> *R. v. Fraser*, 2016 ONCA 745, 33 C.R. (7th) 205, at para. 13
> *R. v. S.M.H.*, 2009 ABCA 315, 464 A.R. 114, at para. 11

[36] The absence of evidence of how the respondent specifically intended to use the gun to "commit a crime" did not bear on mitigation. In *McCue*, this Court recognized that the possession of an illegal firearm, without more, leads to the conclusion that "the offender intended to actively use the loaded gun for some purpose if he saw the need." This is the "bad way" that an illegally possessed firearm is or could be used such that it attracts denunciation and deterrence. Here, the sentencing judge improperly concluded there was "less need" for

denunciation as a result of the absence of the aggravating factor of using his loaded gun in a "bad way".

> *Appeal Book*, Reasons for Sentence, at p. 241 (para. 78)
> *R. v. McCue*, 2012 ONCA 773, 299 O.A.C. 14, at para. 15

iv) The respondent's mental health

[37] For mental health to be a mitigating factor, "the offender must show a *causal link* between his illness and his criminal conduct, that is, the illness is an underlying reason for his aberrant conduct." In the circumstances of this case, there was no evidence of a causal link between the respondent's psychological condition and how he came to possess a loaded gun.

> *R. v. Prioriello*, 2012 ONCA 63, 288 O.A.C. 198, at para. 11
> *R. v. B.S.*, 2018 ONCJ 904 at para 29 (per Wheeler O.C.J.)

[38] The respondent was diagnosed with post-traumatic stress disorder (PTSD) and paranoia in January 2014 at the Adult Mental Health clinic at North York General Hospital by a psychiatrist. The respondent's counsel submitted that as a result of his PTSD, he was "clinically bound to feel a sense of hopelessness and no escape from the community in which he resides". The sentencing judge concluded that "trauma" and "feelings of despair" led the respondent, in conjunction with other factors, to think "I may have that gun".

> *Appeal Book*, Social History of Kevin Morris, at pp. 161, 167 (original: pp. 5, 11)
> *Proceedings (July 19, 2018)*, Vol. 12, at p. 69, ll. 19-23
> *Appeal Book*, Reasons for Sentence, at p. 241 (para. 78)

[39] Respectfully, such a conclusory analysis does not meet the standard of a "causal link" between mental health and criminal conduct. The sentencing judge specifically held that it was "especially" the respondent's mental health conditions, along with systemic factors, that lessened the blameworthiness of his actions. The fact that an offender's offences are in large measure the

product of mental health conditions may significantly reduce moral blameworthiness but there must be a proper evidentiary basis.

Appeal Book, Vol. Reasons for Sentence, at p. 241 (para. 78)

v) Erroneous mitigation for Charter breach

[40] The sentencing judge erred further when he credited the respondent with a 3 month sentence reduction for the *Charter* breaches. In his reasons for sentence the judge said:

> [92] I also find that the anti-Black racism evidence presented on the sentencing is relevant in assessing the weight I should give this. Racism can operate very subtly. It can be there lurking in the background of people's minds, unconsciously influencing their judgment and making them act in certain ways towards certain people.
>
> [93] I want to be clear that I am not painting the police with the brush of overt racism in this case. I do not have the evidence to support that. But I am troubled. If I asked myself: <u>If it was someone other than a young Black man running away from the police that night, would D.C. Moorcroft have driven in the aggressive way that he did? Would Mr. Morris and the car have collided? I am troubled because in all honesty, I cannot conclude it would have happened in the same way</u>. [Emphasis added.]

Appeal Book, Reasons for Sentence, at p. 244 (paras. 92-93)

[41] There are two problems with this reasoning. First, the threshold for sentence mitigation from a Charter breach was not met and therefore no mitigation was appropriate. In dismissing the stay application, the judge found that the collision was "not a deliberate attempt to run down or strike the applicant" and that:

> **37** …the officer was trying to cut the applicant off at the pass, so to speak. But given the speed of the applicant and his sudden move, the officer miscalculated. He drove to prevent the applicant from fleeing. But the officer did not intend to strike him. The contact between vehicle and man was therefore accidental in my view. But the actions of the officer were deliberate.

Appeal Book, Charter Decision, at pp. 187-188, 194 (paras. 33, 37)

[42] The judge concluded that a stay was not warranted due to the "relatively minor nature of the *Charter* violations" but, relying on *Nasogaluak*, he held that a sentence reduction was an

appropriate remedy for this police misconduct. In appropriate cases, a sentencing court may ameliorate the punishment to be imposed, due to state misconduct. The *Charter* breaches in this case related to the accidental collision and post-arrest violations of the offender's right to counsel. The violations did not inform the circumstances of the offence or the offender. The respondent requested a one month sentence reduction. The Crown's submitted no deduction was warranted. The sentencing judge gave a three month reduction. The appellant submits that, as in *Williams*, the declarations of *Charter* non-compliance by the state and public rebuke of the relevant officers would have been sufficient. No further remedy by way of a lesser sentence was appropriate.

> *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 3-4, 47, 49
> *R. v. Williams*, 2018 ONSC 5409, 151 W.C.B. (2d) 126, at para. 51
> *Appeal Book*, Charter Decision, at pp. 187-188, 194 (paras. 67-68)
> *Sentence Proceedings (July 19, 2018)*, Vol. 12, at p. 87, ll. 26-33;
> p. 99, l. 27 – p. 100, l. 8

[43] Second, the sentencing judge purported to find that racial bias, albeit sub-conscious, led D.C. Moorcroft to collide with the respondent's foot as the respondent ran past his vehicle. This finding is unsupported by the evidence. The test for racial profiling was outlined by this Court in *R. v. Brown*. In that case, the Court held that an applicant must establish on a balance of probabilities that an officer used race as a proxy for criminality. *Brown* recognized that racial profiling would usually be proven by an "inference drawn from circumstantial evidence" and that racial profiling can be subconscious. Thus, it was open to the sentencing judge to engage in an analysis of whether evidence of racial profiling or racial bias motivated the *Charter* breaches. The sentencing judge erred, however, because he made a factual finding of racial bias in the absence of the evidentiary threshold established in *Brown*.

> *R. v. Brown* (2003), 64 O.R. (3d) 161 (Ont. C.A.), at para. 44
> *Peart v. Peel (Regional Municipality) Police Services Board* (2006), 217 O.A.C. 269 (Ont. C.A.), at para. 140

[44] Indeed, after stating that anti-Black racism could be unconscious or subtle and asking a series of rhetorical questions, the sentencing judge held that he could not "conclude" that the outcome would have been the same had the respondent not been Black. In other words, the judge could *not* conclude that the outcome of what transpired would be the same if the respondent was of a different race. It follows that he could not find, on a *balance of probabilities,* that the respondent was subjected to differential treatment on account of race. Thus, to assign the *Charter* breach greater "weight" in mitigating the sentence imposed on account of racism was a an error.[5]

D. Delay in Sentencing and Award of Pre-Sentence Custody

[45] The sentencing judge gave the respondent an enhanced credit at a rate of 1.5 for pre-sentence custody for the 375 days that elapsed between the jury's verdict and the date of sentencing. In doing so he effectively awarded the respondent a credit of 187.5 days for having delayed his own sentencing hearing. But for the respondent's **April 4, 2017** arrest on the Peel charges his time spent in pre-sentence custody would have been roughly 25 days (i.e. arrested on December 13, 2014 and released on January 5, 2015). The award of enhanced credit (approximately six months) for additional time that the respondent spent in pre-sentence custody as a result of his adjournment requests contributed to a demonstrably unfit sentence.

[5] It also stands to reason that if the judge was satisfied on a balance of probabilities that the collision was the result of racial bias then his view of the section 7 Charter breach would have been much different.

E. Towards an Appropriate and Workable Framework

[46] The consideration of systemic and background factors in the context of Indigenous offenders and s. 718.2(e) of the *Criminal Code* has matured since *Gladue*. However, appellate jurisprudence on the consideration of these factors for non-Indigenous offenders is limited. Recent cases in Ontario and other provinces have grappled with the question of how to address these factors in sentencing. This area of law is in need of further analytical development and clarity from this Court. The submissions set out in this section are offered to assist in that task.

> *Criminal Code*, RSC 1985, c C-46, s. 718.2
> *R. v. Elvira*, 2018 ONSC 7008
> *R. v. Brissett and Francis*, 2018 ONSC 4957, 149 W.C.B. (2d) 680
> *R. v. Jackson*, 2018 ONSC 2527, 46 C.R. (7th) 167
> *R. v. Ferguson*, 2018 BCSC 1523, 150 W.C.B. (2d) 738
> *R. v. "X"*, 2014 NSPC 95, 353 N.S.R. (2d) 130

i. Systemic and background factors may be relevant at sentencing

[47] In *Gladue* and *Ipeelee*, the Supreme Court held that the consideration of systemic and background factors is not limited to Indigenous offenders. This Court has similarly held that sentencing principles are "sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence" and that assessing moral culpability "can encompass systemic racial and gender bias". Therefore, systemic and background factors can be relevant to the commission of any offence at the sentencing stage. This approach is in line with the statement in *Ipeelee* that sentencing is an individualized process. It is also consistent with the approach taken in foreign jurisdictions.

> *R. v. Gladue*, [1999] 1 S.C.R. 688, at paras. 69, 80; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 77, 86; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (Ont. C.A.), at para. 134
> *R. v. Borde* (2003), 6 O.R. (3d) 417 (Ont. C.A.), at para. 32
> **Foreign Jurisdictions:** *Bugmy v. The Queen*, [2013] HCA 37; *Munda v. Western Australia*, [2013] HCA 38; *Keil v. R.*, [2017] NZCA 563; *Fane v. R.*, [2015] NZCA 561; *RS (CA31-2014) v. R.*, [2014] ZCA 484; *Mika v. R.*, [2013] NZCA 648

ii. General societal context (judicial notice) versus offender-specific evidence

[48] Judicial notice is the acceptance by a court without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are so notorious as to not be the subject of dispute among reasonable persons; or capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party.

[49] In *R. v. Jackson*, the sentencing judge – Nakatsuru J. – stated:

> I find that for African Canadians, the time has come where I as a sentencing judge must take judicial notice of such matters as the history of colonialism (in Canada and elsewhere), slavery, policies and practices of segregation, intergenerational trauma, and racism both overt and systemic as they relate to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration.
>
> *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at paras. 48-49
> *R. v. Sutherland*, 2016 ONCA 674, 342 C.C.C. (3d) 309, at para. 35
> *R. v. Jackson*, 2018 ONSC 2527, 46 C.R. (7th) 167, at para. 82
> Alan W. Bryant, Michelle Fuerst & Sidney N. Lederman, *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018), at p. 1393.

[50] It is important to distinguish between general evidence of societal ills and specific evidence of how those societal ills impacted an offender's level of moral blameworthiness. A meaningful link to moral blameworthiness requires more than correlation. It is one thing to take judicial notice of such matters as "the history of colonialism (in Canada and elsewhere), slavery, policies and practices of segregation, […] and racism both overt and systemic…" But concepts such as "intergenerational trauma" and general assumptions about how these factors translate into socio-economic ills and higher levels of incarceration for an individual offender are not capable of judicial notice.

[51] There must be specific evidence in the sense of some evidence that racial disadvantage is linked to constraint of a particular offender's choices and life experience in bringing him before the court.

> *R. v. F.H.L.*, 2018 ONCA 83, 360 C.C.C. (3d) 189, at paras. 40-42
> *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (Ont. C.A.), at para. 133
> *R. v. Brissett and Francis*, 2018 ONSC 4957, 149 W.C.B. (2d) 680, at paras. 60-62
> *R. v. Williams*, 2018 ONSC 5409, 151 W.C.B. (2d) 126, at para. 43-44
> *R. v. Nimaga*, 2018 ONCJ 795, 151 W.C.B. (2d) 247, at para. 45
> *R. v. Peazer*, [2003] O.J. No. 6283 (Ont. S.C.J.), at paras. 56-59
> *R. v. Downey*, 2017 NSSC 302, 143 W.C.B. (2d) 416, at para. 10

[52] For example, in *Williams*, Hill J. explained that:

> Having regard to the insidiously stealthy, subtle and general incalculable impact of racial discrimination, and the uniform guidance of Supreme Court of Canada guidance in the context of offenders of Aboriginal ancestry (*Gladue*/*Wells*/*Ipeelee*) rejecting a straight-line causation analysis, between cultural disadvantage and commission of an offence, before cultural background context is relevant to the sentencing function, the court's *dicta* in *Hamilton* is best understood to mean that the record before the court ought to raise this issue from the general to the specific in the sense of some evidence, direct or inferential, that racial disadvantage is linked to constraint of a particular offender's choices and to his life experience in bringing him before the court.
>
> *R. v. Williams*, 2018 ONSC 5409, 151 W.C.B. (2d) 126, at para. 45

iii. Systemic and background factors may be relevant in assessing moral blameworthiness

[53] The rationale for considering systemic and background factors at sentencing is to enable *individualization*. The individualization of a sentence takes into consideration the ***true moral choice*** that an offender makes. Evidence of social context may assist a sentencing judge in understanding or appreciating the existence of social conditions that operate systemically to constrain an offender's true moral choice to some degree. The nature and impact of such constraints can be relevant in assessing an offender's level of moral blameworthiness provided there is some *reasonable connection* to the offence.

> *R. v. Borde* (2003), 6 O.R. (3d) 417 (Ont. C.A.), at paras. 2, 17-25, 30, 35
> *R. v. McIntyre*, 2018 ONCA 210, 146 W.C.B. (2d) 207, at para. 27
> *R. v. Rage*, 2018 ONCA 211, 146 W.C.B. (2d) 247, at paras. 12-14

iv. Systemic and background factors are not relevant to denunciation for non-Indigenous offenders

[54] The "judicial and social censure" embodied in the "just deserts" component of proportionality suggests that systemic and background factors are not relevant to the weight ascribed to denunciation and the seriousness of a crime itself. This must be so because denunciation "mandates that a sentence should also communicate society's condemnation of that particular offender's conduct."

> *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 42
> *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81

[55] Any relevance that systemic and background factors have to the moral blameworthiness of an individual offender should not extend to denunciation. Otherwise, the collective statement of abhorrence for a particular crime that denunciation represents would always be defeated. The *singular exception* to the preceding point is for *Indigenous offenders* pursuant to the *Gladue* regime. The unique systemic and background factors that render Indigenous offenders more adversely affected by incarceration, less likely to be rehabilitated when incarcerated, permit a distinct view of denunciation where systemic and background factors played a "**significant role**" in the commission of an offence.

> *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81
> *R. v. Gladue*, [1999] 1 S.C.R. 688, at paras. 68-69

[56] This recognition is echoed in *Borde* where this Court emphasized that "traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by aboriginal offenders and their community." Indigenous Communities shared and practiced a decidedly different understanding of sentencing. There is

no basis that permits an inference of a similar common historical understanding or rejection of particular sentencing ideals, for racialized offenders beyond the Indigenous context.

> *R. v. Borde* (2003), 6 O.R. (3d) 417 (Ont. C.A.), at para 32
> *R. v. Jackson*, 2018 ONSC 2527, 46 C.R. (7th) 167, at para. 57-59, 71, 73
> *R. v. Nimaga*, 2018 ONCJ 795, 151 W.C.B. (2d) 247, at para. 49
> *R. v. Brissett and Francis*, 2018 ONSC 4957, 149 W.C.B. (2d) 680, at para. 66
> *R. v. Gabriel*, 2017 NSSC 90, 37 C.R. (7th) 206, at paras. 45-49

v. Systemic and background factors cannot oust the requirement of proportionality

[57] Proportionality is the fundamental principle of sentencing. It represents the convergence of two perspectives. The first "requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and gravity of the offence", a "limiting and restraining function". The second engages the "just deserts" philosophy of sentencing. The second component of proportionality "seeks to ensure that offenders are held responsible for their actions and that a sentence properly reflects and condemns their role in the offence and the harm caused".

> *Criminal Code*, RSC 1985, c C-46, s. 718.2
> *R. v. Proulx*, 2000 SCC 5, [2002] 1 S.C.R. 61, at para. 54
> *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 42 citing *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81
> *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 533-34, Wilson J., concurring

[58] The converging perspectives of proportionality establish the tangible impact of proportionality in fashioning a fit sentence. Where an assessment of moral blameworthiness is dominated by a particular sentencing objective (or objectives), a sentence risks becoming disproportionate. This point is reiterated in *Ipeelee*: "Whatever weight a judge may wish to accord to the various objectives and other principles in the *Code*, the resulting sentence must respect the fundamental principle of proportionality."

> Whatever the rationale for proportionality, however, **the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and**

> **not greater than it**. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.
>
> *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37
> *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 42

[59] The moral blameworthiness assessment at the sentencing stage flows from the *mens rea* for a particular offence. Thus the relationship between the *mens rea* of an offence and moral blameworthiness provides a useful starting point when assessing the import of systemic and background factors on an individual offender for a particular offence.

> It is this mental state which gives rise to the "moral blameworthiness" which justifies the state in imposing the stigma and punishment associated with a criminal sentence.... [I]t is this same element of "moral blameworthiness" which animates the determination of the appropriate quantum of punishment for a convicted offender as a "just sanction". [Emphasis added.]
>
> *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 79

[60] There are a range of potential impacts that systemic and background factors might have on an offender's moral blameworthiness. At the high end of the scale are cases where systemic and background factors directly relate to the *mens rea* or nature of the offence itself and there is specific evidence relating to the particular offender. At the low end of the scale are cases where systemic and background factors are said to generally increase the risk of an offender's participation in criminal behaviour. In either case, the *individual agency exercised by the offender should be given due weight and consideration*.

vi. Where systemic and background factors relate to the nature of the specific offence

[61] Systemic and background factors are most relevant when they are connected to the nature of the offence. Consider, for example, an offender who is a recent refugee adapting to life in Canada and is poor. If she commits an act of theft, the broader backdrop of the difficulty for

recent refugees in attaining gainful employment may be a factor that weighs on the moral blameworthiness of her own act of theft. She is both poor as a matter of her individual circumstance and belongs to a group that experiences systemic challenges in acquiring gainful employment. Both are relevant to understand the context of economic deprivation in which she committed an act of theft. Conversely, where that same offender commits an act of pre-mediated murder against her spouse, systemic and background factors do not have an obvious relationship with the nature of the offence. Without more, it would be an error to import the challenges the offender may have faced in adapting to Canada as a refugee to her moral blameworthiness for murder.

[62] This example illustrates that it is important and necessary for sentencing judges to explain *how* the systemic and background factors in a given case bear on the offender's moral blameworthiness for the particular offence. This need not be a direct causal relationship, but it must be more than the fact of adversity or membership in a particular racial group. That, standing alone, should not and cannot diminish moral blameworthiness.

vii. Where systemic and background factors relate to the participation in criminal behaviour more generally

[63] Systemic and background factors may also affect the ability of a person to develop pro-social behaviours, or increase their exposure to and therefore risk of participation in a criminal lifestyle, such that it becomes a relevant consideration of their moral blameworthiness for a particular offence. This proposition is well-settled:

> The offender's background is always a relevant factor on sentencing. A sentence must be appropriate for both the offence and the offender. A person with a disadvantaged background, who has been subjected to systemic prejudices or racism, or was exposed to physical, sexual or emotional abuse, may receive a lower sentence than someone from a stable and peaceful background, where the offence is in some way linked to the

> background or systemic factors. The relevant factors in one person's background will be case specific. A single factor will rarely be determinative.
>
> *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (Ont. C.A.), at para. 141, citing *R. v. Bennett* (July 13 2003), Brampton 5889/02 (Ont. S.C.J.), at pp. 14-15

[64] The recognition that background and systemic factors can affect an offender's moral blameworthiness contextualizes the environment in which an individual exercises their moral agency. This was observed in *R. v. Gabriel*, 2017 NSSC 90, where the sentencing judge considered systemic and background offences to determine the parole eligibility of a Black Canadian offender for second degree murder:

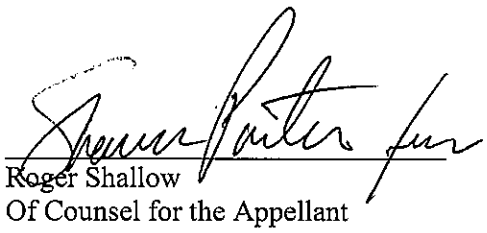
> The *Gladue* Report and the Cultural Impact Assessment broaden the context from the more proximate causes toward ultimate ones. Kale Gabriel was a drug dealer with a gun but he didn't become that by a single act of free will. Family violence and criminality were a part of his family life. They were not all of it though. He was not left without moral guidance and had a mother who took a strong and active role in his life. His education was compromised to some extent by his identification and self-identification with his background. He began to identify himself with a criminal lifestyle and adopted attitudes and behaviours that were consistent with that. That was a series of choices. He made them. But they are also a product of his background and his environment.
>
> *R. v. Gabriel*, 2017 NSSC 90, 37 C.R. (7th) 206, at para. 125

[65] Manifestations of systemic racism are inevitably present in the lived experience of nearly every racialized person. While potentially relevant to the issue of moral blameworthiness, evidence of systemic racism generally cannot oust the need for a proper evidence based assessment of moral blameworthiness, one that is centered on the principle of individual moral agency. The obligation of a sentencing judge is to impose a sentence that is proportionate to the circumstances of the offender and the offence. Social context evidence can provide a better understanding of the offender and the circumstances that led to the offence. It should not be an excuse or justification for criminal conduct and it does not create a race-based discount. Criminal sentencing courts cannot be a surrogate for remedying the myriad of societal ills, or arbitrarily reducing incarceration rates.

PART IV. ORDER REQUESTED

[66] The appellant requests that leave to appeal sentence be granted, the appeal be allowed, and the respondent's sentence be increased to at least three years.

ALL OF WHICH is respectfully submitted by,



Roger Shallow
Of Counsel for the Appellant

24 January 2019

APPENDIX I

Case	Sentence	Plea	SF[6]	Distinctions
R. v. Dalton 2018 ONSC 544, 144 W.C.B. (2d) 288	After 15 months of actual PTC, a 12-month conditional sentence (¶57).	Yes (¶1).	Yes (¶13-15).	• Guilty plea. • Expression of remorse (¶34). • Motive to protect son/family (¶52).
R. v. Shunmuganathan 2016 ONCJ 519, 132 W.C.B. (2d) 515	Conditional 24-month less one day sentence (¶19).	Yes (¶1).	Yes (¶8).	• Guilty plea. • Offender told police about weapon, "exceptional facts" (¶19).
R. v. Rutledge 2015 ONSC 6625, 125 W.C.B. (2d) 572	18-month custodial sentence (¶63).	No (¶9)	No	• *Mens rea* of wilful blindness (¶11). • Significant mitigating factors (¶60).
R. v. Cadienhead [2015] O.J. No. 3125 (Ont. S.C.J.)	18-month custodial sentence (¶18).	No	Yes (¶14)	• Expression of remorse (¶27).
R. v. Ishamel 2014 ONCJ 136, 112 W.C.B. (2d) 518	18-month custodial sentence (¶28).	Yes (¶20)	No	• Guilty plea. • Gun not in a public place (¶16).
R. v. Nuttley 2013 ONCJ 727, 111 W.C.B. (2d) 242	After 11 months equivalent credit for PTC, a 12-month conditional sentence (¶22, 66, 71).	Yes (¶1)	Yes (¶26-27)	• Guilty plea. • Offender told police the location of the gun (¶8). • Gun in private residence (¶9). • Severe alcohol addiction (¶32).
R. v. Williams 2011 ONSC 3914, 95 W.C.B. (2d) 666	After 4.5 months of actual PTC, a 12-month custodial sentence (¶17, 19).	No	No	
R. v. Brown (2006) 71 W.C.B. (2d) 976 (Ont. S.C.J.)	15-month custodial sentence (¶14).	Yes (¶2)	No	• Guilty plea.
R. v. Carranza (2004) 70 W.C.B. (2d) 110 (Ont. S.C.J.)	12-month custodial sentence (¶18).	No (¶2-3)	No	• Severe conditions in PTC (¶18).

[6] Abbreviation for "systemic factors".

SCHEDULE A - AUTHORITIES TO BE CITED

R. v. Delchev, 2014 ONCA 448, 323 O.A.C. 19

R. v. Marshall, 2015 ONCA 692, 340 O.A.C. 201,

R. v. Nur, 2013 ONCA 677, 117 O.R. (3d) 401, aff'd 2015 SCC 15, [2015] 1 S.C.R. 773

R. v. Smickle, 2013 ONCA 678, 304 C.C.C. (3d) 371

R. v. Gladue, [1999] 1 S.C.R. 688

R. v. F.H.L., 2018 ONCA 83, 360 C.C.C. (3d) 189

R. v. Angelillo, 2006 SCC 55, [2006] 2 S.C.R. 728

R. v. Gardiner, [1982] 2 S.C.R. 368

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SCHEDULE B – RELEVANT LEGISLATIVE PROVISIONS

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Criminal Code, RSC 1985, c C-46, s. 718.2

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COURT OF APPEAL FOR ONTARIO
(Proceedings Commenced at Toronto)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

KEVIN MORRIS

Respondent

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