

**RESPONDENT'S FACTUM**

**INDEX**

<b>RESPONDENT'S OVERVIEW</b>	<b>1</b>
<b>PART 1 – RESPONDENT'S STATEMENT OF THE FACTS</b>	<b>2</b>
1. The Respondent's Background	2
2. No Prior Record	2
3. Single Parenthood	2
4. Learning Disability and Education	3
5. Child Welfare System	3
6. Lower Socio-economic and Dangerous Living Conditions	4
7. Victim of Violence and Trauma	5
8. Mental Illness	5
9. Anti-Black Racism	6
10. The Reports and Admissibility	8
11. State Misconduct	11
12. Delay to Get the Reports and Impact on Sentence	12
<b>PART II- RESPONSE TO APPELLANT'S ISSUES</b>	<b>14</b>
<b>1. Standard of Review</b>	<b>14</b>
<b>2. Procedure and Use of the Reports:</b>	<b>16</b>
i) Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario. (Academic report)	16
ii) Social History Report of Mr. Morris: Enhanced Pre-sentence Report or Impact Race and Culture Assessment	19
iii) IRCA Precedents	22
<b>3. The Sentencing Principles Applied</b>	<b>27</b>
1. Morris' Background and the Degree of Responsibility or Moral Blameworthiness:	27
2. The Crown's Position of "At Least 3 years"	32
3. Denunciation, Deterrence and Fitness of the Sentence	33
4. Remorse	35
5. Aggravating and Mitigating Factors Including Police Misconduct	35
<b>4. Conditions and Mistreatment in Jail:</b>	<b>37</b>
<b>PART III – ADDITIONAL ISSUES</b>	<b>40</b>
<b>PART IV – ORDER REQUESTED</b>	<b>40</b>
<b>SCHEDULE A - AUTHORITIES CITED</b>	<b>41</b>

## RESPONDENT'S OVERVIEW

1. By the young age of 22, Kevin Morris had endured a life of profound hardship. He experienced poverty, extreme violence, mental illness and anti-Black racism.<sup>1</sup> There is a connection between those factors and the reason he committed this crime.
2. It is difficult for a sentencing judge to decide the right length of jail time for a youthful first time offender with an extraordinary background. With the assistance of better pre-sentence materials prepared by professionals with expertise in anti-Black racism and clinical social work, the judge considered the sentencing principles, the gravity of the offence and Mr. Morris's background.
3. The sentencing hearing was fair. The Crown was given notice and full disclosure concerning the enhanced pre-sentence reports. The prosecution had full opportunity to challenge the evidence. The Crown chose not to examine the professors regarding their compelling report about the current state of anti-Black racism in Ontario. The Crown cross-examined the clinical social worker regarding her report about Mr. Morris. The judge found the reports are reliable.
4. The judge imposed a just sentence: a significant jail term of 15 months for a severely disadvantaged person who has mental and physical disabilities. The judge reduced that sentence by a modest three months because the police had violated Mr. Morris's Charter rights and unnecessarily ran over his foot with their vehicle causing serious bodily harm.
5. Justice Nakatsuru relied on his vast experience as a criminal jurist to provide a thorough sentencing decision.<sup>2</sup> The reasons are sound and affirm the well-established principle that sentencing must be individualized and not reliant on ranges, tariffs, or de-facto mandatory minimums. The sentence is not manifestly unfit.

---

<sup>1</sup> Confronting Anti-Black Racism Update. (2019). Update on Toronto Action Plan to Confront Anti-Black Racism. Retrieved from: <https://www.toronto.ca/legdocs/mmis/2019/ec/bgrd/backgroundfile-134609.pdf>

<sup>2</sup> *R. v. Morris* [2018 ONSC 5186](#)

## **PART 1 – RESPONDENT’S STATEMENT OF THE FACTS**

### **i. The Respondent’s Background**

6. The judge’s findings of facts about the Respondent’s background are accurate. They are corroborated by the totality of the direct evidence: interviews with the Respondent, family members, community leaders, and original education and medical records. They are confirmed by the professors’ report about anti-Black racism in Ontario. The judge had the benefit of more reliable evidence than is typically presented about marginalized Black offenders.

### **ii. No Prior Record:**

7. At the time of the offence Kevin Morris was 22 years old. He had no criminal record.

### **iii. Single Parenthood:**

8. His father lived separately and died of cancer when Kevin was 7 years old. The absence of a father meant he had no male role model and this had a profoundly negative impact on his life. He had an older male friend in the community but he was shot to death in 2003.<sup>3</sup> Morris did not receive any counseling for either major loss.

9. He was raised by a single mother who had to struggle to make ends meet. His family lived on social assistance or on his mother’s wages in precarious jobs including as a cafeteria worker. She was not home due to her work. Neither were the Respondent’s older siblings.<sup>4</sup> Black people are disproportionately represented in precarious employment.<sup>5</sup>

---

<sup>3</sup> Sentencing Reasons at para. 37, Appeal Book p. 232; Social History Report at p. 9, Appeal Book p. 165.

<sup>4</sup> Sentencing Reasons, para. 37 and following, Appeal Book p.232; Social History Report at p. 2, Appeal Book p. 158

<sup>5</sup> Expert Report of Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario, Appeal Book at page 139

iv. Learning Disability and Education:

10. Mr. Morris's education history was summarized in the Social History report that drew from original education records. He has a learning disability, expressive and attention difficulties that contributed to behavioural problems and impeded his success at school.<sup>6</sup> He changed schools often. He was suspended and subject to school discipline without a plan to address his underlying problems.<sup>7</sup> He was placed in a special needs school but was taunted. He felt unsafe walking to that school because he had to cross through neighbourhoods where he was threatened with violence.<sup>8</sup>

11. The Respondent did not feel that he received the help he needed to overcome his disabilities from members of the school staff. This made him feel like he was a failure.<sup>9</sup> His mother, Esta Reid, felt that he was treated more harshly by school administration than other students for minor incidents. Kevin was reprimanded when the peer that provoked an incident was not.

v. Child Welfare System:

12. His mother did not feel that she or her son were treated fairly by the CAS system who intervened periodically based on reporting from the school for alleged physical abuse.<sup>10</sup> This

---

<sup>6</sup> Respondent's Appeal Book, Tabs 25-27, pp. 78-106, Individual Education Plans 2005-2007; Social History Report at p. 5-7, Appeal Book p. 161.

<sup>7</sup> Social History of Kevin Morris at Appeal Book page 163; Respondent's Appeal Book, Tab 30, Letters of Suspension March 2002 - June 2005, page 113 and following.

<sup>8</sup> Social History of Kevin Morris at Appeal Book page 163; Respondent's Appeal Book, Tab 27, Individual Education Plan, dated June 2006, at page 96.

<sup>9</sup> Social History of Kevin Morris at Appeal Book page 163; Appeal Book, p. 180; Respondent's Appeal Book, at Tab 1, Notes of Camisha Sibblis of the interview conducted with the Respondent, Mr. Morris at Maplehurst Detention Centre on February 9, 2018, at page 6.

<sup>10</sup> Respondent's Appeal Book, at Tab 3, Camisha Sibblis interview conducted with the Respondent's mother, Esta Reid on February 27, 2018, at page 12.

inequity in treatment from child services and the education system is consistent with the experience of many Black people.<sup>11</sup>

vi. Lower Socio-economic and Dangerous Living Conditions:

13. The Respondent lived in a neighbourhood of inner-city public housing. The community pastor described the neighbourhood as having a reputation for danger. By the age of 10 years old, Mr. Morris was acutely aware of people dying in his neighbourhood from violence.<sup>12</sup> This is also a trend that is too common for marginalized Black persons.<sup>13</sup> 44 percent of Black children live in poverty compared to 15 percent of non-racialized children.<sup>14</sup>

14. The pastor also advised that many community members do not trust the police to provide help. They felt the police were adversarial to them because they were Black and lived in the Brahms neighbourhood. Mr. Morris stated that he had numerous negative interactions with the police and he felt mistreated.<sup>15</sup>

---

<sup>11</sup> Expert Report of Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario at Appeal Book, page 134-135. See also Confronting Anti-Black Racism Update. (2019). Update on Toronto Action Plan to Confront Anti-Black Racism. Retrieved from: <https://www.toronto.ca/legdocs/mmis/2019/ec/bgrd/backgroundfile-134609.pdf> at pp. 3-4.

<sup>12</sup> Social History of Kevin Morris at pp. 8-9, Appeal Book page 16; Respondent's Appeal Book at Tab 2, Notes of Camisha Sibblis of the interview conducted with Mr. Morris at Maplehurst Detention Centre on March 9, 2018, at page 9.

<sup>13</sup> Expert Report of Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario at Appeal Book page 139

<sup>14</sup> 2018 Toronto Child & Family Poverty Report. Retrieved on May 13, 2019 at p. 8 [http://www.torontocas.ca/sites/torontocas/files/2018\\_Child\\_Family\\_Poverty\\_Report\\_Municipal\\_Election\\_Edition.pdf](http://www.torontocas.ca/sites/torontocas/files/2018_Child_Family_Poverty_Report_Municipal_Election_Edition.pdf)

<sup>15</sup> Social History Report of Kevin Morris at pp. 9-10, Appeal Book page 165-166.

vii. Victim of Violence and Trauma:

15. Mr. Morris was small in size and was picked on often. He was repeatedly the victim of grievous violence. He was stabbed twice.<sup>16</sup> In 2009 the Respondent was in pre-trial custody in a youth jail and was stabbed.<sup>17</sup> In 2013, he was stabbed a second time in the community while walking in his neighbourhood and was critically injured. His spleen and part of his pancreas had to be removed.<sup>18</sup> He tried to go back to high school but stopped because of the injuries.

viii. Mental Illness:

16. In 2013, based on the violence he experienced, he was diagnosed by a psychiatrist with PTSD, paranoia, dysphoria and anxiety. This is documented in the original medical records that were disclosed to the Crown and before the judge. The physical and psychological pain was profound; he became isolated, and he had few people to talk to. This was never treated.<sup>19</sup> His medical conditions were aggravated in jail and contributed to a harsher experience in pre-trial custody.

17. He did not work after the stabbing and did not take programs at Ontario Works because he feared the neighbourhoods were not safe. He still suffers from physical symptoms resulting from the stabbing.

18. He had no way out of the neighbourhood as a kid. He felt death awaited him.<sup>20</sup>

---

<sup>16</sup> Respondent's Appeal Book, Tab 31, Sunnybrook Health and Sciences Centre Records, dated February 20, 2013, at page 131.

<sup>17</sup> Social History Report of Kevin Morris at pp. 10-11, Appeal Book at p. 166-167

<sup>18</sup> Respondent's Appeal Book, Tab 31, Sunnybrook Health and Sciences Centre Records, dated February 20, 2013, at page 131, and Notes of Dr. Keshavjee G.P., dated January 27, 2016 at page 146-152 of pdf

<sup>19</sup> Social History of Kevin Morris at p. 7, Appeal Book page 163; and Respondent's Appeal Book, Tab 34- Medical Report of Dr. Athens, dated April 15, 2013 at p. 150; and Tab 35 - North York General Hospital Adult Mental Health Outpatient Program Report of Dr. Athens, dated January 21, 2014, at page 151-154.

<sup>20</sup> Sentencing Reasons at para. 40, p. 9, Appeal Book p. 233; Social History Report

ix. Anti-Black Racism:

19. The reports expose that the Respondent's current experiences, point for point, mirror (or exceed) all of devastating manifestations of anti-Black racism documented in studies for the past 30 years but have not been consistently addressed in sentencing.<sup>21</sup>

In Ontario, Mr. Stephen Lewis was appointed as an Adviser on Race Relations to the Premier of Ontario in June of 1992. His conclusions with respect to the state of race relations in the province and particularly in Toronto, are most disturbing (Letter of S. Lewis to Premier Rae (9 June 1992) at p. 2):

First, what we are dealing with, at root, and fundamentally, is anti-Black racism. While it is obviously true that every visible minority community experiences the indignities and wounds of systemic discrimination throughout Southern Ontario, it is the Black community which is the focus. It is Blacks who are being shot, it is Black youth that is unemployed in excessive numbers, it is Black students who are being inappropriately streamed in schools, it is Black kids who are disproportionately dropping-out, it is housing communities with large concentrations of Black residents where the sense of vulnerability and disadvantage is most acute, it is Black employees, professional and non- professional, on whom the doors of upward equity slam shut. Just as the soothing balm of "multiculturalism" cannot mask racism, so racism cannot mask its primary target.<sup>22</sup>

20. The judge deserves credit for being the first jurist in Ontario to tackle this omission. He addressed how the Respondent was negatively impacted by anti-Black racism at various key stages of his life.<sup>23</sup> Overall, Morris felt nihilism and no escape. After reviewing his background in depth, the social worker, Ms. Sibblis summarized it succinctly.

---

<sup>21</sup> *Le supra* at para. 96; *R. v. Parks* [1993] O.J. No. 2157 (C.A.) at para. 46-48; Report of the Commission on Systemic Racism in the Ontario Criminal Justice System. 1995. Commissioners: Margaret Gittens, David Cole, Toni Williams, Sri-Guggan Sri-Skanda-Raja, Moy Tam, Ed Ratushny. <http://www.ontla.on.ca/library/repository/mon/25005/185733.pdf>

<sup>22</sup> *R. v. Parks* [1993] O.J. No. 2157 (C.A.) at para. 47

<sup>23</sup> Social History of Kevin Morris at p 7, Appeal Book at page 163; Respondent's Appeal Book, Tab 4, Notes of Camisha Sibblis of the interview conducted with Esta Reid on April 10, 2018, at page 14; Expert Report of Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario, at Appeal Book at page 129. See also *R. v. Le* 2019 SCC 34 at paras. 93-94 citing the [Independent Street Checks Review. 2018. The Hon. Mr. Justice Tulloch. Chapter 2](#) (Tulloch Report) at pp. 41-42; and the Ontario Human Rights Commission. *A Collective Impact: Interim report on the inquiry into racial profiling and racial*

From a young age, Mr. Morris was fatherless, and was subsequently raised by a single mother who worked long hours in an attempt to provide for her family. Mr. Morris also experienced the harsh realities posed by his living in social housing, and having been identified in his early years as “slow” and having behavioural issues. He was shuffled from school to school, faced violence from his peers, and experienced the stigmatization and associated behaviours from both his teachers and the police. Mr. Morris felt that he could not turn to his mother for guidance because “she had enough on her plate already”; he could not turn to his teachers or the police for guidance as they thought he was a lost cause; and he could not turn to his friends because most were in the same position as he. He is [sic] also felt that his lack of educational success, combined with the stigmatization of living in a “bad” neighborhood have limited his employment opportunities.

Under the weight of anti-Black racism, Mr. Morris had little option than to live his life as best as he could having been influenced by the streets. His overall social circumstances, while not excusing his behaviour, have undeniably contributed to Mr. Morris being involved with the justice system today.

Mr. Morris has also lived, and continues to live, in constant fear. He fears the police, other community members, friends and foes alike, rivals, unknown dangers, life, death. He fears fellow inmates. He fears for his mother’s safety. Mr. Morris fears both freedom and incarceration. Mr. Morris’s imagination for what he could become was significantly limited by fear, anxiety, and actual threats; it is not positively fostered as his suffering was not sufficiently tended to.

At this time, it would be appropriate to provide him with the support and treatment he ought to have received long ago. Early intervention might well have changed Mr. Morris’s trajectory and it appears as though anti-Black racism was a contributing factor in this omission. Since Mr. Morris shows empathy, and has many redeeming qualities, it is a reasonable expectation that he will respond well to mental health treatment. His mother also experienced anti-Black racism through precarious employment, negative relationships with school and child welfare, and treatment by the police.<sup>24</sup>

21. The judge considered all of this information carefully and thoroughly explained its relevance to his decision:

[74] As Ms. Sibblis, Professor Owusu-Bempah, and Professor James say, anti-Black racism has shaped your life in a way that has brought you into the criminal court. It shaped

---

[\*discrimination of Black persons by the Toronto Police Service\*](#). Government of Ontario, November 2018 at pp. 19, 21, 25-26, 37.

<sup>24</sup> Sentencing Reasons at paras. 46, 74, p. 10, 15, Appeal Book pages. 234, 239; Social History Report at p. 19, Appeal Book p. 175

your mother's life as well. It has negatively impacted your opportunities in life to date. You lived in a poor neighborhood, with a number of socio-economic challenges. This was an environment that was affected by anti-Black racism. You yourself have wondered why Blacks seem to live a lot in certain neighborhoods. Yours was affected by danger in the streets, both real and perceived. You did not find a way out through the public education system. I have no doubt that anti-Black racism affected how you were treated in school. Ms. Sibblis notes this very persuasively. I am not saying that your teachers were racist, uncaring, or that you do not share responsibility. Rather, I am recognizing the studies that show systemically this racism exists and have not served Black children well. That failure in the education system makes a child vulnerable to becoming involved in the criminal justice system. Because your mother was working so much and the death of your father impacted you so hard, you became vulnerable to the bad influences of others. You are a follower and not a leader. Your feelings of frustration and powerlessness as you grew up in this environment made the possibility of possessing a gun real to you; something that given your life experiences, you decided that you wanted to do.

[77] Another important case-specific factor is that these anti-Black experiences aggravated your mental health. A medical clinician suggested you are living with Post-Traumatic Stress Disorder or PTSD. Given that you were attacked twice, once so badly you lost your spleen and part of a pancreas, I can fully accept that. You also suffered the loss of your father early in your life. You have suffered from fear and anxiety since you became aware of the type of environment you lived in at the age of ten. You have lost friends to violence. Black males are disproportionately victims of violence. Ms. Sibblis notes that the constant systemic barriers fostered a greater sense of hopelessness and desperation in you. You needed help to deal with this defeatist outlook, poor impulse and anger control, hyper-vigilance, anxiety, and fear. You did not get that help. I can only agree with this statement made by Ms. Sibblis:

Being incarcerated within his skin, his urban neighbourhood, his schools, his life—afflicted by occlusion, abjectness, and ineptitude, limited in his possibilities, could only add to Mr. Morris's sense of helplessness and despair.

x. The Reports and Admissibility

22. The judge found that the conventional PSR authored by the probation officer was inadequate in this case. He accurately described it as sparse and not helpful. It did not assist the judge to fulfill his duty as mandated by the Criminal Code<sup>25</sup> and common law. Additional information about Mr. Morris was required.<sup>26</sup>

---

<sup>25</sup> See Criminal Code sections 721, 723, 724, 726 that outline the ability of sentencing judges to obtain relevant information about the offender to impose a proportionate sentence pursuant to section 718.1

<sup>26</sup> Sentencing Reasons at paragraph 30, 47; and Pre-Sentence Report, Appeal Book at p. 203

23. A conventional PSR does not address the complex parts of a marginalized Black person's distinct background. As a result, important perspective to satisfy proportionality and determine a just sentence is lost. The defence sought to obtain better materials to assist the court with understanding the Respondent's life.

24. The reports obtained and submitted by counsel for the Respondent were prepared by highly qualified professors and a social worker with specialized knowledge of anti-Black racism; Professor Carl James PhD; and Professor Akwasi Owusu Bempah PhD; and Camisha Sibblis, RSW, MSW, and Phd Candidate. All three work extensively with the Black community.

25. The two professors' report "*Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario. 2018*" explains the current context of anti-Black racism and its deleterious effects on the daily lives of Black people in Ontario. It reviews the devastating conditions under which marginalized Black people like the Respondent, reside, receive education and experience violence. It examines the negative ways that Black people are dealt with by child protection, the police, and jails. The Crown did not object to the content of the report. The Crown objected that the report was not necessary because of *general* acceptance of anti-Black racism.<sup>27</sup>

26. The second report: "*Social History of Mr. Morris*" authored by clinical social worker Camisha Sibblis relies on interviews with the Respondent, his family, pastor, community members, educational records, medical records, and other important information to provide a more complete picture of the Respondent's life. After a thorough background review, Ms. Sibblis summarized the impact of anti-Black racism on Mr. Morris.

---

<sup>27</sup> Transcript of Proceedings July 19, 2018 at p. 5

27. Notices of expert evidence were filed to provide the Crown and Court with the authors' CVs, reports and full disclosure of the underlying interviews and records. The defence was prepared to qualify each expert *under the sentencing procedure* and framework with full opportunity given to the Crown to cross-examine and make submissions. It was conceded that the Court always has an obligation to ensure that the author's evidence does not stray from his qualifications or express unwarranted opinions. Judges perform the same oversight with respect to other reports and conventional PSRs.<sup>28</sup> It is notable that reports with analogous content are routinely admitted and used in sentencing hearings everyday across this nation: *Gladue* reports, PSRs, therapist reports, medical reports, educational assessments, reference letters, community leader letters etc.

28. The Crown objected to the admission of the *Social History Report* without having a *Mohan voir dire* to determine the author's scope of the expertise. The judge noted his duty to ensure the evidence was admissible but that different procedure applies on sentencing. The judge gave the Crown full opportunity to cross-examine the authors on their credentials, fact gathering and opinion. The Crown chose to only cross-examine social worker Ms. Sibblis. There was no prejudice to the Crown's ability to argue admissibility or weight, and they did so.<sup>29</sup>

---

<sup>28</sup> *R. v. White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015 SCC 23](#) (CanLII) and *R. v. Abbey*, [2017 ONCA 640](#) (CanLII).

<sup>29</sup> Volume 12 Transcript dated July 19, 2018 at p. 6 lines 12 – 29, p. 8 lines 18 – 29, p. 10 lines 17 – 20 and p. 21 line4 – p. 36 line 10.

xi. State Misconduct

29. The judge found that the police failed to give Mr. Morris his rights to counsel. They also used their vehicle and drove over the Respondent's foot when he fled. This conduct was careless and negligent. It caused the Respondent serious long-term injury.

30. The judge's conclusion that this was relevant to the sentence was based on the fact that "It was unnecessary and careless for D.C. Moorcroft to drive the way he did."<sup>30</sup> He noted that Officer Moorcroft's car was driving fast for being in a parking lot. The judge held that the situation was not urgent.<sup>31</sup> At the time the Respondent fled, the officers had nothing more than reasonable suspicion to question the Respondent and they were not going to arrest him: "While they generally matched the description in terms of race, gender, and numbers, the description given by the complainant was so generic that it was of little value in forming reasonable grounds."<sup>32</sup>

31. The judge found that the officer's aggressive use of his vehicle, and the harm it caused the Respondent, contributed to his negative perception of the police. As a result, the judge granted the Respondent 3 months consideration for this misconduct.<sup>33</sup> Studies published by the OHRC confirm that Black people are much more likely to have force used against them by the TPS that results in serious injury or death. This contributes to fear and distrust of the police.<sup>34</sup>

---

<sup>30</sup> *R. v. Morris* [2017 ONSC 4298](#) (Charter ruling) at paras. 32, 38, p. 8, Appeal Book p. 188; Sentencing Reasons at para. 91, Appeal Book

<sup>31</sup> *Ibid Morris* Charter ruling at para. 38, p. 8, Appeal Book at page 188

<sup>32</sup> *Ibid*, para. 6 p. 2, Appeal Book at p. 182

<sup>33</sup> Sentencing Reasons at paras. 90 to 96, p. 19, Appeal Book p. 243

<sup>34</sup> *R. v. Le* [2019 SCC 34](#) at para. 93 citing OHRC *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service. November 2018.*

xii. Delay to Get the Reports and Impact on Sentence

32. The Respondent was in jail at the time of his sentencing since April 4, 2017. His bail had been pulled by his surety after facing subsequent charges arising on that date. As a result, he was in custody on all charges including the gun charges. He was permitted to use pre-disposition custody as 1.5:1 credit towards his sentence for this case. He did not want to be sentenced later.

33. Initially, the matter was adjourned for a presentence report to be prepared by a probation officer. In the interim, efforts were made to have Mr. Morris' charges waived in from Brampton for the purposes of obtaining a global sentence. Efforts by the defence were frustrated by the lack of communication from the Office of the Crown Attorney.<sup>35</sup>

34. Once the presentence report was received on September 27, 2017, it became very apparent to all of the justice participants that it was woefully inadequate. This was addressed at the next appearance of October 13, 2017. The defence requested an opportunity to obtain material in furtherance of providing the judge with the evidence required to fairly determine sentence.<sup>36</sup>

35. The adjournments sought by his trial counsel were required to get Legal Aid Ontario (LAO) funding to identify and retain qualified persons to prepare the requisite sentencing reports to provide the evidentiary foundation to litigate the sentence. This litigation had never been done in Ontario before. In the past, the Court of Appeal has commented that evidence of this nature should be presented before the sentencing judge who has broad discretion.<sup>37</sup> There was a large

---

<sup>35</sup> Transcript of Proceedings - Volume 2 dated September 27, 2017 at pp. 1-4

<sup>36</sup> Ibid at p. 4; Transcript of Proceedings, Volume 3 dated October 13, 2017 at p. 2. The judge notes the PSR is "not particularly enlightening" and later at p. 11-12 explicitly states that it is "unhelpful."

<sup>37</sup> *R v Borde*, [\(2003\) 63 OR \(3d\) 417 \(ONCA\)](#), [2003 CanLII 4187](#), [172 CCC \(3d\) 225](#). *R v Hamilton*, [72 OR \(3d\) 1 \[2004\] OJ No. 3252 \(C.A.\)](#). *R v Rage*, [2018 ONCA 211 \(CanLII\)](#).

disparity between the sentence sought by the Crown of 4.5 years and the defence position to be informed by the reports.

36. Funding of important legal issues via LAO means that there are inherent systemic factors and delay beyond the control of the Respondent associated with obtaining the requisite funding. First a special application to LAO must be prepared. Second a specific committee must consider the request based on their schedule. Third, the funding is either approved with conditions or denied. Of note, the defence only received funding approval just prior to December 11, 2017 when they were able to advise the court of the same.<sup>38</sup> Fourth, the report authors require time to assemble a considerable amount of information and present their findings in writing. Fifth, once completed, the Crown requires time to review the reports.

37. The matter was heard after a reasonable period of 6 months once funding was granted, factoring Christmas holidays and a death in trial counsel's family.<sup>39</sup> The dates for the sentencing hearing were set on the earliest possible dates taking into consideration the availability of defence counsel, the assigned Crown attorney and the jurist who had by that time been transferred to the civil team of the court which meant his availability to hear a criminal sentencing matter was drastically reduced.<sup>40</sup> Further, the defence, wanting to ensure that the authors of the reports were available to give evidence, was restricted by the availability of the three busy professionals. The hearing was set for 2 days so that there was sufficient time for the Crown to examine witnesses.<sup>41</sup> It was completed in a day. The adjournments of the sentencing hearing for approximately 12

---

<sup>38</sup> Transcript of Proceedings - Volume 5 dated December 11, 2017.

<sup>39</sup> Transcript of Proceedings – Volume 7, dated February 14, 2018

<sup>40</sup> Transcript of Proceedings - Volume 9 dated February 28, 2018 at page 3.

<sup>41</sup> Transcript of Proceedings – Volume 10, dated March 27, 2018 at p. 3; Volume 11 dated June 11, 2018 at p. 1-2.

months were not ideal but no delay was incurred as a result of deliberate ‘stalling’ or laches on the part of the Respondent.

38. During that time the Respondent endured extremely difficult living conditions at both the Maplehurst Detention Centre and the Toronto South Detention Centre. Mr. Morris suffered, not the State. The Respondent received 1.5 for 1 credit because he was in a custodial setting that is recognized in law to not apply to his parole eligibility where he has no access to programs. He suffered from lockdowns and hardships due to insensitivity by jail staff concerning his medical conditions.<sup>42</sup> In principle, he could have sought higher credit because the conditions were deplorable. He described the conditions in the jail to Ms. Sibblis with candour:

“.. Mistreated a lot. Lots of lockdowns citing short staff but it's an excuse because they don't want to work. Once they locked them down to have a bbq outside. They will do searches, they will take or throw away your canteen, guard told him that his reputation precedes him and so he is the victim of unwarranted searches - incidents cause the guards too much paperwork. One guard will turn on the fan on him and his stomach is sensitive to the cold due to his condition. Toilet broke in the beginning of February and the feces water was backed up and he had a lockdown and he could not use the bathroom to defecate because he had a lockdown and a non-functioning toilet- he was on lockdown the entire weekend- he was able to defecate once on Saturday and then had to beg to go on Monday after having held it.”<sup>43</sup>

## **PART II- RESPONSE TO APPELLANT’S ISSUES**

### **1. Standard of Review**

39. Sentencing for this offence is not a scientific or mathematical calculation that should be viewed as “an at least” 3 years calculation as proposed by the Appellant. The Supreme Court has repeatedly stated that due deference must be given to trial judges who have considerable experience working on the front lines of criminal justice, live in the same affected

---

<sup>42</sup> Sentencing Reasons at para. 97, p. 20, Appeal Book at p. 244

<sup>43</sup> Respondent’s Appeal Book, Tab 2, Notes of Camisha Sibblis of the interview conducted with Mr. Morris at Maplehurst Detention Centre on March 9, 2018, page 10.

neighbourhoods, and sentence persons regularly for the offences in issue. They will have a comparative advantage to appellate judges due to their expertise in performing this key function on a daily basis. They know the circumstances and conditions of the offender and the community over which they preside.<sup>44</sup> They have the benefit of observing the testimony of the police, civilian witnesses and accused.

40. In *Lacasse*, [2015 SCC 64 \(CanLII\)](#), the Supreme Court reminded reviewing courts of the wide discretion given to sentencing judges:

[11] This Court has on many occasions noted the importance of giving wide latitude to sentencing judges. Since they have, *inter alia*, the advantage of having heard and seen the witnesses, sentencing judges are in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code* in this regard. The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.

[12] ...if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of trial courts. ...<sup>45</sup>

41. The Court stressed the importance of individualization<sup>46</sup> and explained that deviation from ranges is not synonymous with an error of law or an error in principle. The imposition of a sentence outside the range does not make it demonstrably unfit. The value of any comparison to general “guidelines” turns largely on their proximity to an offender’s personal circumstances in his or her unique case.<sup>47</sup> If an individual’s circumstances greatly

---

<sup>44</sup> *R v M (CA)*, [\[1996\] 1 SCR 500](#), 105 CCC (3d) 327 at para 90; *R. v. Lacasse*, [2015 SCC 64 \(CanLII\)](#), [2015] 3 S.C.R. 1089, at paras. 11-12, 44-46; *R. v. Shropshire*, [1995 CanLII 47 \(SCC\)](#), [1995] 4 S.C.R. 227, 102 C.C.C. (3d) 193

<sup>45</sup> *R. v. Lacasse*, [2015 SCC 64 \(CanLII\)](#), [2015] 3 S.C.R. 1089, at paras. 11-12, 44-46.

<sup>46</sup> *R v Lacasse*, [2015 SCC 64](#).

<sup>47</sup> *R v McGill*, [2016 ONCJ 138](#) at para 82.

differ from those that justify the sentencing range, a sentence within that range would not be fit:

[58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. *This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.*<sup>48</sup>

42. The sentencing judge carefully considered the facts, sentencing principles, and drew reasonable conclusions. Justice Nakatsuru's vast experience presiding in Toronto at both levels of Court, sentencing persons for the same offence, informed his reasons. His Honour's knowledge of *Gladue* sentencing is also well respected.<sup>49</sup> He is aware that anti-Black racism is distinct yet recognizes that there is more for him and his peers on the bench to learn.

## **2. Procedure and Use of the Reports:**

i) *Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario. (Academic report)*

43. This overview report was prepared by Professor James and Professor Owusu-Bempah.

[15] Professor James is the Jean Augustine Chair in Education, Community, and Diaspora at York University and a Fellow of the Royal Society of Canada. He has a Ph.D. in sociology. He has been an assistant professor at York University since 1993 and a full professor since 2003, in Education, Sociology, and Social Work departments at various times in his career. He has held various administrative posts and has received many awards and honors. He has been involved in the authorship or editing of nearly 20 books, 64 chapters of books, and 37 articles in peer reviewed articles. ...He is an expert in the experiences of racialized young people, particularly

---

<sup>48</sup> *Ibid.*, at 58; see also *R v Nasogaluak*, [2010 SCC 6](#) at para 44.

<sup>49</sup> *R v Pelletier*, [2016 ONCJ 628 at 8, 13-18, 22, 25](#); *R v Armitage*, [2015 ONCJ 64 at 14-22 re: value of the reports to sentencing](#).

with regard to the effects of racialization and racism on the lives of young Black people.

[16] Professor Owusu-Bempah was more recently appointed in 2016 as an assistant professor in the Department of Sociology at the University of Toronto. However, he has also been a professor at Indiana University in the United States where he was in the Department of Criminal Justice and the Department of African American and African Diaspora Studies. His Ph.D. is in Criminology and Socio-legal Studies. His Master's degree is in Criminology as well. He has written articles on race, policing, crime, and the criminal justice system. His academic credentials are also impressive.

44. First, the Crown did not object to the substance of the report. The Crown did not ask to cross-examine the authors who were present and available at the hearing. The trial Crown objected to the admissibility of this report, claiming that it was *not necessary* because there is judicial notice of anti-Black racism in general.<sup>50</sup>

45. The report is necessary and relevant. The professors' report provides current facts about anti-Black racism relevant to sentencing. The contextual evidence in the professors' report is specific to key institutions that affect the daily lives of marginalized Black persons that are disproportionately represented in the criminal justice system. It is necessary because it provides a critical update to dated findings from decades past. There is limited judicial recognition of anti-Black racism in relatively dated cases about challenges for cause or racial profiling such as *Parks*<sup>51</sup> and *Brown*<sup>52</sup>.

46. Second, the details matter. The report provided a touchstone for the sentencing judge to evaluate the similarities to the Respondent's life circumstances. In other words, this overview information enabled the judge to accurately assess the Respondent's specific circumstances, a core function of a sentencing judge.

---

<sup>50</sup> Transcript of Proceedings July 19, 2018 at p. 5

<sup>51</sup> *R. v. Parks*, [1993 CanLII 3383](#) (ON CA).

<sup>52</sup> *R. v. Brown*, [2003 CanLII 52142](#) (ON CA)

47. Third, the Crown’s objection to the report raises a larger systemic problem that marginalized Black people face in sentencing. With respect to proof of the complex manner that anti-Black racism affects their daily lives and how it transcends from parent to child, and cycles repeatedly. If at the time of the hearing the Respondent had proceeded with just the PSR and tried to argue that the specific issues that adversely affect the Black community were notorious facts such as: dangerous living environment, mistreatment in child welfare, disproportionate streaming and suspensions in schools, discrimination in employment, over-policing, racial profiling, greater pre-trial detention and mistreatment in jail, he surely would have been met with an objection that there was an absence of an evidentiary foundation. Additionally, the judge would not have been equipped to reason from the general to the specific. The report was necessary to serve as a bridge between studies and Mr. Morris’s particularized experiences identified in the Social History report.

48. Moving forward, the professors’ report (that is attached as an appendix to the *Morris* ruling) should be admissible to support judicial notice of the current scope and specific manner that Black persons encounter systemic and direct discrimination. As noted by the Supreme Court in *Le*,

Evidence about race relations relevant to the detention analysis, like all evidence of social context, can be derived from “social fact” or the taking of judicial notice. The information necessary to inform the reasonable person can take the form of reliable research and reports that are not the subject of reasonable dispute; and, rarely, direct, testimonial evidence.<sup>53</sup>

49. It is appropriate for sentencing judges to take notice of “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.”<sup>54</sup>

---

<sup>53</sup> *R v. Le* [2019 SCC 34](#) at para. 71; *R. v. Spence*, [\[2005\] 3 S.C.R. 458](#) at para. 57, 65;

<sup>54</sup> *R v. Jackson*, [2018 ONSC 2527](#) at para 82; see *R v. Le* [2019 SCC 34](#) at para. 71

*ii) Social History Report of Mr. Morris: Enhanced Pre-sentence Report or Impact Race and Culture Assessment*

50. This report was necessary. The PSR was inadequate. The judge welcomed the information about Mr. Morris contained in the Social History report because it was a superior pre-sentence report. The judge correctly stated that he needed to know more to come to the right sentence.<sup>55</sup>

51. The facts in the report are relevant, probative and reliable. They are beyond the knowledge of the judge. They provide the required foundation to render a fit sentence. The report contains critical information that permits reasonable inferences about how these specific circumstances affected Mr. Morris's moral culpability.

52. The opinion portion of the report connects the information together in a coherent manner. In particular, it helps the judge identify and assess the link between how anti-Black racism manifests in the community, and how anti-Black racism impacted Mr. Morris's specific circumstances. Consistent with his duty, the judge assessed the opinion by reviewing the underlying evidence.

53. A review of the original records and witness interviews substantiate Ms. Sibblis's opinion. The judge's findings are reasonable based on those materials even in the absence of the social worker's opinion. This is not a case where the decision is contingent on the opinion.

54. For example, the medical records confirmed that as a result of the trauma from being stabbed and the loss of organs, he suffered from PTSD, anxiety, dysphoria and paranoia since 2013.<sup>56</sup> The mental health report assessment dated February 6, 2014 confirms that since being stabbed multiple times in an extremely traumatic way, Morris has persistent flashbacks of the incident and nightmares.<sup>57</sup> He did not trust anyone.

---

<sup>55</sup> Volume 12 Transcript dated July 19, 2018 at p. 7 lines 8 – 14; PSR, Appeal Book at p. 203.

<sup>56</sup> Respondent's Appeal Book, Tabs 34-36. Medical records. Morris also said he was stabbed at age 17 as a youth briefly in pre-trial custody while at the Roy McMurtry Jail. Tab 2 at p. 8.

<sup>57</sup> Respondent's Appeal Book, Sentencing Record Addendum, Tab 3 at p. 152-153. Mental Health Assessment of Dr. Wahdwa.

55. The pastor Mr. Erb, corroborated that the Brahm's neighbourhood was dangerous.<sup>58</sup> The children's centre worker, Ms. Chase advised that she assisted Kevin shortly after he was stabbed by a person known to him.<sup>59</sup>

56. His mental health conditions compound his fear. Mr. Morris was still afraid for life as of the date of the offence. The severe mental health conditions documented in the report are proximate to the offence date of December 13, 2014.

57. The education records dating back to kindergarten, 1992, clearly show that Morris had learning disabilities from an early age. They severely constrained his reading, writing and math development. He had an inability to express himself. He was viewed to have major behavioural problems. From the ages of 10 to 13 he was suspended often.<sup>60</sup> By grade 4, Morris was placed in special education. In that setting he was taunted by his peers, called dumb. He fought for himself and was disciplined. He felt that he was not treated fairly in school. His mother confirmed negative interactions with the school.<sup>61</sup> This contributed to Morris's sense of hopelessness.

58. Mr. Erb, Ms. Reid, Ms. Gilliam confirmed that like Mr. Morris, even though they are all law abiding people, they also experienced negative interactions with the police that contributed to distrust.<sup>62</sup>

59. Despite the compelling evidence, the Crown claims Ms. Sibblis's straight forward opinion should not have been admitted. At para. 46 of the reasons, the summation cited is entirely consistent with the records and proven facts. Notably, the Crown did not object to the

---

<sup>58</sup> Respondent's Appeal Book at Tab 5 p. 17-18.

<sup>59</sup> Respondent's Appeal Book at Tab 6, p. 20. Interview notes of Olive Chase.

<sup>60</sup> Respondent's Appeal Book, Tabs 8 to 30.

<sup>61</sup> Respondent's Appeal Book, Sentencing Record Addendum, Tabs 1-3, Interviews with Morris and his mother.

<sup>62</sup> Respondent's Appeal Book, Tabs 1-3, 39. Interview notes and letter of Ms. Gilliam.

admissibility of the original records that substantiate the opinion. The judge was entitled to accept the clinical opinion by a qualified professional that was cross-examined. She was credible.

60. Ms. Sibblis is a clinician with specialized knowledge in anti-Black racism. She has a Master's Degree in Social Work and is a Ph.D. candidate at York University. The dissertation for her doctorate is about the effects of expulsion programs on the Black male identity and trajectory. She has a post-graduate certification in therapy. She has published articles about racism, education, and Black youth. She has taught at universities and colleges. She has clinical experience working with persons that struggle with similar issues in schools, Children's Aid Societies, and the Office of the Children's Lawyer.<sup>63</sup> As a result, she is able to identify relevant issues and provide useful information that a probation officer does not.

61. She took the necessary time to develop the professional relationship with Morris, his family and collaterals to extract the information. As Justice Derrick noted in the precedent case of *X* (discussed below), there is significant value in a Black social worker that is familiar with community dynamics speaking with the client to assist the Court by gathering more useful information: "It is reasonable to think that as an African-Nova Scotian, Mr. Wright may have been able to connect with "X" through their shared racial and cultural heritage."<sup>64</sup>

62. It is clear from the PSR that Morris did not discuss the intimate details of his family's life, struggles, regrets, pain and anguish with a probation officer. He has difficulties expressing himself because of his disability. No adverse inference should be drawn against Morris due to inadequacy of the PSR. The interview with a probation officer is brief, a single session that is at most a few hours long. Probation officers also serve an adversarial role of enforcing compliance with conditions.

---

<sup>63</sup> Appeal Book, C.V. of Camisha Sibblis at pp. 56 and 57

<sup>64</sup> *R. v. "X"*, [2014] N.S.J. No. 609, at para. 189

63. The Crown was afforded full opportunity to question the author, Ms. Sibblis about her findings. She was qualified. Her report was thorough and reliable. She acknowledged that if she had more time and access she would have sought even more information. The cross-examination did not support a finding that the report was not admissible or was deserving of less weight.

64. The Crown's claim that Ms. Sibblis improperly relied on the mother's personal experience with CAS, to find her experience was consistent with the documented experiences of numerous Black families, is without merit. That was a reasonable inference available on the evidence. The notion that the CAS records, which were not accessible and clearly would not document the nature of the mistreatment alleged, were necessary for the mother's perspective to be accepted is unreasonable. It also loses sight of the fact that the mother's experience had a negative impact *on her* and that this perception is worthy of consideration.

65. This was a sentencing hearing where the Criminal Code permits a relaxed evidentiary standard and distinct approach to sentencing including the admission of hearsay.<sup>65</sup>

### iii) IRCA Precedents

66. The use of the report in this case was consistent with precedents. Since this case was released, there has been no disruption in the ability of judges to sentence individuals on a daily basis with or without an IRCA. Judges continue to be as cautious as they always were. The difference is that in the appropriate case, the report helps the justice system.

67. By way of background, the report in issue called Social History report is also sometimes called *Impact Race and Culture Assessments* (IRCAs) or culturally competent pre-sentence reports. They have assisted judges to better understand Black persons sentenced in Nova Scotia at both

---

<sup>65</sup> Criminal Code sections 723 to 724

provincial and Superior Courts for several years.<sup>66</sup> Judges in Nova Scotia now order this enhanced pre-sentence report from the bench.

68. *R. v. X*,<sup>67</sup> was the first reported case to use an IRCA. The case dealt with a young offender convicted of attempt murder where the Crown was seeking an adult sentence. X was found guilty of shooting his estranged cousin. Social worker Robert Wright (MSW, Phd cand.) authored the IRCA which provided the sentencing judge with considerable background and contextual evidence about X's experience as a member of the Black community. That evidence helped Justice Derrick (then an experienced jurist of the Nova Scotia Youth Court and now of the Nova Scotia Court of Appeal) to understand that the profile of the accused was more complex than his anti-social behaviour suggested.<sup>68</sup> Mr. Wright informed that X's presentation, which was viewed as unremorseful and anti-social, was likely influenced by racial models for coping with the criminality that affected his community.<sup>69</sup> Justice Derrick acknowledged that it is important for her to understand *the unique racial and cultural factors* of African-Canadians in the sentencing process. The IRCA goes beyond other pre-sentence materials like a PSR or s. 34 report to provide "a more textured, multi-dimensional framework for understanding "X", his background and his behaviours."<sup>70</sup> It helps the court to realize that often the accused is both a perpetrator and a victim

---

<sup>66</sup> *R. v. "X"*, [\[2014\] N.S.J. No. 609](#), and *R. v. Gabriel*, [\[2017\] N.S.J. No. 125](#), *R. v. Perry*, [2018 NSSC 16](#) (Black and Aboriginal) at paras. 21 to 26, , *R. v N.W.*, [2018 NSPC 14](#) at paras. 131-136; and *J.C. (Re)*, [2017 NSPC 14](#) at para. 39 regarding post sentencing programming. See also Culture, community and sentencing: culturally competent pre-sentence reports.; by Faisal Mirza.; (Nov. 2017) 38 For the Defence No. 3, 34-39

<sup>67</sup> *R v X*, *supra*.

<sup>68</sup> *Ibid.*, at para 75.

<sup>69</sup> *Ibid.*, at para 189.

<sup>70</sup> *Ibid.*, at paras 193.

of violence in the context of his criminally impacted community.<sup>71</sup> Justice Derrick ruled that a youth sentence by way of Custody and Supervision Order was the just sanction.<sup>72</sup>

69. Mr. Wright's evidence was unsuccessfully challenged by the Crown in that case. IRCAs are now routinely ordered by judges and admitted on consent. However, as with other reports tendered on sentencing, any controversial aspect of the report is tested through cross-examination and submissions by both sides. Since they are only used in sentencing, there is no danger of misuse by a jury. Judges retain discretion to accept none, some, or all of the report.

70. The reports have assisted judges to understand misperceptions about the lived experiences of marginalized Black offenders in Ontario cases as well.<sup>73</sup>

71. *R v. Jackson*<sup>74</sup>, was the first case that an IRCA was used in Ontario. The offender plead guilty in Toronto to possession of a restricted firearm with ammunition and breach of several weapons and ammunitions prohibitions. Jackson was from Nova Scotia. He had a lengthy prior record but transcripts revealed that his complex background had never been considered in numerous prior sentencing hearings. Robert Wright authored the IRCA. It was admitted on consent of the Crown. The report identified the following relevant information: Jackson spent most of his life in Nova Scotia, in a community with a history of racial tension. He lived primarily in a single parent home; his mother, who raised him, had serious mental health issues. He did not have access to programs or support to assist him or his mother. He had a history of disciplinary issues in school. The dynamics in his community were of poverty, racism, and lack of programming. The intergenerational and systemic effects of anti-Black racism had a significant impact on his life and conduct. Justice Nakatsuru's ruling held that the IRCA report was of assistance to "see how

---

<sup>71</sup> *Ibid.*, at paras 198.

<sup>72</sup> *Ibid.*, at para 252

<sup>73</sup> *R v. Jackson*, [2018 ONSC 2527](#) *R. v. T.J.T.*, [2018 ONSC 5280](#)

<sup>74</sup> *Jackson*, *supra*

your ... experiences with racism and socio-economic disadvantage in your community may have affected your conduct. Your choices. Your current and past contact with the criminal justice system. It helps me to better reason between the general rules I must apply to your specific case.”<sup>75</sup> The Crown sought 8.5 to 10 years in jail. The Court imposed 6 years. The Crown did not appeal.

72. In *R. v. TJT*, the issue was whether a youth or adult sentence should be imposed for a 15 year old boy found guilty by a jury of second degree murder in London Ontario. The IRCA obtained by the defence was authored by professor Owusu-Bempah and admitted on consent. It assisted Justice Garson to understand the young offender’s “hell of much of his childhood.” that impacted his critical reasoning and decision making.<sup>76</sup> The report included descriptions of his father having been in jail most of his life, his brothers looking after him as his mother worked two jobs - night and day - to raise five boys, the death of his grandmother, the murders of his friends, and his two older brothers being shot multiple times.<sup>77</sup> Justice Garson weighed all the relevant factors and imposed a youth sentence. The Crown did not appeal.

73. Contrary to the Appellant’s claim, when the reports are applied in Nova Scotia and Ontario the rulings have not caused any confusion. Sentencing judges have applied the information in the reports responsibly. Naturally, when no report is tendered, judges are reluctant to reason from general judicial notice about anti-Black racism to the specific circumstances of the individual before them. When an IRCA has not been prepared for the sentencing judge and counsel have asked judges to consider intersectional disadvantage and anti-Black racism, the sentencing judge’s task is far more difficult because they lack the evidentiary foundation to engage in the

---

<sup>75</sup> *Jackson supra* at para. 123

<sup>76</sup> *R. v. TJT* [2018 ONSC 5280](#) at paras. 42-47; 78-82

<sup>77</sup> *Ibid* at para. 53.

analysis. As a result, some judges have simply refused to do so, finding that they cannot without being provided more information about the individual's life experiences.<sup>78</sup>

74. Experienced criminal judges such as Schreck J. and Hill J. have acknowledged the detrimental impact of, anti-Black racism *generally* and its insidiously stealthy nature as part of the sentencing equation, but have indicated that without enhanced pre-sentence materials like an IRCA they are constrained in their ability to reason from the general to the specific.<sup>79</sup> In *Williams*, Justice Hill cited the Court of Appeal's language in *Hamilton* but noted that it has been refined by subsequent Supreme Court rulings that state a causal link is not required. Still, from a practical perspective a connection from research to the specific individual is important to assist judges to particularize<sup>80</sup>:

[137] The respondents did not try to forge any evidentiary connection between institutional racial and gender inequality and their particular circumstances. There was no attempt to bring the generalizations set out in the material relied on by the trial judge home to the lives of these respondents. Absent that kind of evidence, the trial judge *could not* find that the respondents' difficult economic circumstances were the direct result of systemic racial and gender bias. (*quoted from Hamilton*)

[45] 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.<sup>81</sup>—

---

<sup>78</sup> *R. v. Ferguson*, [2018 BCSC 1523](#), 150 W.C.B. (2d) 738 at paras 120-129; *R. v. Brissett and Francis*, [2018 ONSC 4957](#), 149 W.C.B. (2d) 680 at para. 61-71; *R v Bryce* [2016 ONSC 7897](#)

<sup>79</sup> *R v. Elvira*, [2018 ONSC 7008](#) at paras. 21 to 26; *R v. Williams*, [2018 ONSC 5409](#) at para. 45-47

<sup>80</sup> Particularization also ensures that general race based discounts are not sought as per the judge's criticism of counsel seeking a discount without an IRCA in *R. v. Brissett and Francis* [2018 ONSC 4957](#), [149 W.C.B. \(2d\) 680](#), at paras. 68-69

<sup>81</sup> *R v. Williams*, [2018 ONSC 5409](#) at para. 45-47; citing. *R. v. Hamilton* [72 OR \(3d\) 1 \[2004\] OJ No. 3252 \(C.A.\)](#) at para. 137

75. Justice Nakatsuru followed this Court’s guidance for applying the reports from the general to the specific, adhering to sentencing procedure and the Criminal Code. The ruling complies with this Court’s guidance about applying *Gladue* reports. In *F.L.*,<sup>82</sup> the Court of Appeal indicated how a *Gladue* report should be used:

For an offender’s Aboriginal background to influence his or her ultimate sentence, the systemic and background factors affecting Aboriginal people in Canadian society must have impacted the offender’s life in a way that (1) bears on moral blameworthiness, or (2) indicates which types of sentencing objectives should be prioritized in the offender’s case.

### **3. The Sentencing Principles Applied**

#### 1. Morris’ Background and the Degree of Responsibility or Moral Blameworthiness:

76. The judge painstakingly scrutinized the evidence of Mr. Morris’ combined experiences and found that they constrained his life choices and impacted his moral blameworthiness. Contrary to the Crown’s assertion, the judge never held it was *not* a moral choice to possess the gun.

[76] I appreciate not every young Black child who is subject to the same pressures as you, makes the choices you did. Nothing that I say here should be taken to mean that you did not have a moral choice when you committed these crimes. However, what I do say is that your choice was constrained by these forces. Social structures and societal attitudes that were born of colonialism, slavery, and racism have a very long reach. We must not forget this. Our memory of past injustices must be long enough to do justice in an individual case.

[77] Another important case-specific factor is that these anti-Black experiences aggravated your mental health. A medical clinician suggested you are living with Post-Traumatic Stress Disorder or PTSD. Given that you were attacked twice, once so badly you lost your spleen and part of a pancreas, I can fully accept that. You also suffered the loss of your father early in your life. You have suffered from fear and anxiety since you became aware of the type of environment you lived in at the age of ten. You have lost friends to violence. Black males are disproportionately victims of violence. Ms. Sibblis notes that the constant systemic barriers fostered a greater sense of hopelessness and desperation in you. You needed help to deal with this defeatist outlook, poor impulse and anger control, hyper-vigilance, anxiety, and fear. You did not get that help. I can only agree with this statement made by Ms. Sibblis:

---

<sup>82</sup>*R. v. F.L.* [2018] OJ No 482 (C.A.) at para 40.

Being incarcerated within his skin, his urban neighbourhood, his schools, his life – afflicted by occlusion, abjectness, and ineptitude, limited in his possibilities, could only add to Mr. Morris’s sense of helplessness and despair.<sup>83</sup>

77. The judge was aware that by law he must consider the offender’s cumulative disadvantages as relevant to assessing moral blameworthiness and the application of general deterrence and denunciation. In both *Ipeelee* and *Gladue*, the Supreme Court mandated that an understanding of individual background and systemic factors are important for sentencing a non-aboriginal offender.<sup>84</sup> The socio-economic and racial disadvantages experienced by the offender are relevant to the degree of moral culpability and inform the way the sentencing principles should be applied. In *Borde*,<sup>85</sup> the Court of Appeal accepted that the background and systemic factors facing African Canadians, where they are shown to have played a part in the offence, may be considered when determining the sentence:

The principles that are generally applicable to all offenders, including African Canadians, 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 the values of the community from which the offender comes.<sup>86</sup>

78. The judge had a reasonable basis to find a connection between the disadvantages Morris suffered, and the offending conduct. This finding was relevant to the application of the sentencing factors<sup>87</sup>:

56]...Over the lifetime of the offender, negative influences such as poverty, addiction, mental illness, neglect and abuse in childhood, disrupted family and social

---

<sup>83</sup> Sentencing Reasons at paras. 76-77, p. 15-16, Appeal Book p. 239-240

<sup>84</sup> *R v Ipeelee*, [\[2012\] 1 SCR 433](#) at para 77; *R v Gladue*, [\[1999\] 1 SCR 688](#) at para 69.

<sup>85</sup> *R v Borde*, [\[2003\] OJ No 35](#) at para 27.

<sup>86</sup> *Ibid.*, at 32.

<sup>87</sup> *Peel Law Association v. Pieters*, [2013 ONCA 396](#) at paras. 58-60. In human rights law, all that is required is that there be a “connection” between the adverse treatment and discrimination. In Morris’s case there was a connection between his experiences with poverty, mental health, being a victim of violence, anti-Black racism and his offending conduct.

networks, and the denial of employment and social advancement can constrain this field of choice. It can also be adversely affected by the environment or community in which the offender was raised or presently lives; fragile communities that are under daily stress given their marginalization and in-cohesion. General deterrence of people who live in such circumstances and have experienced such lives is not a concept that should be applied in a rigid and simplistic way.

[75] These are systemic and case-specific factors that lessen your moral blameworthiness for this offence and soften the impact of general deterrence and denunciation in your particular case, Mr. Morris. They are relevant and compelling in my view. They are factors that tell me that I should choose the length of your sentence with the principle of restraint firmly in my mind.

...

[78] So why would you pick up a gun Mr. Morris? The factors that make up who you are, like everyone else, are numerous, complicated, and hard to trace. The same can be said for motivation. You never testified as to why you had this gun. But as I stated before, there is no evidence that you got it to commit a crime. The other evidence about who you are shows you are not a violent man or one with no regard for laws or social rules. In the context of the evidence as a whole, I can understand why a man of your background, a young Black man, suffering from trauma, with such limited opportunities, with feelings of despair, being influenced by others, may think that I will have that gun. I know that it is not mitigating when people carrying illegal guns for self-defence. That does not lessen the seriousness of the crime or the responsibility of the offender. Your case is different in my view. I can see more clearly the path that has led you here. I understand it. When I look at it, especially your mental health condition that may have made you vulnerable to taking that gun, as influenced by the systemic factors that surrounded you and your life, I find it lessens the blameworthiness of your actions. There is less need to denounce your specific crime especially when the gun was not used by you at all in a bad way. Detering others who might be in a similar situation as you are can be done by something different than a penitentiary jail sentence

79. It is not an error for the judge to recognize that Morris' possession of a loaded gun is a serious offence worthy of deterrence and denunciation while at the same time understanding contextually that his decision was informed by his extreme vulnerability and fear of death. The judge correctly identified his duty was to deal with the gravity of the misconduct but also to assess the degree of responsibility of the offender. In order to determine the right jail term he had to make findings about the circumstances of the individual and the offence. This is why the report was so crucial in this case. The report informed the judge in a meaningful way that Mr. Morris was the victim

of extreme violence multiple times resulting in loss of organs, had witnessed persons killed in his neighbourhood, and feared “friends” and strangers could harm him at any time. He felt constantly threatened. Due to violent trauma, Mr. Morris suffers from serious mental conditions of anxiety, paranoia and PTSD. These conditions were never treated and they exacerbate his feelings of intense fear. Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

80. The Crown factum takes out of context the judge’s use of the word “understand” and errs in claiming the judge engaged in determinist thinking, even stereotyping. The Crown focuses their position on individual agency or choice. However, the report reveals that Morris’s moral agency was impacted by these systemic issues. The report helps to answer an essential question, why he did this.

81. Based on the totality of evidence about Morris’s background, it was open for the judge to infer that he committed the offence of possession of a prohibited firearm with ammunition because he feared being killed, was physically and mentally compromised, was desperate, and lived in a dangerous environment.

82. With respect to the Appellant’s argument this was a “true crime”, the Crown did not prove more than mere possession with discarding the handgun in a stairwell during flight due to fear of the police. Proof of aggravating features must be beyond a reasonable doubt.<sup>88</sup> The Crown did not prove that the Respondent had the firearm in his possession as a tool to commit a further offence or as part of a criminal trade. He did not possess it to intimidate or threaten. He did not

---

<sup>88</sup> Criminal Code section 724(3)(e).

intend to pose a danger to the public.<sup>89</sup> This, coupled with the fact that the judge made no finding that Mr. Morris believed his conduct would put anyone in harm's way means that the facts of this case are distinguishable from how the Appellant casts them.

83. In *Nur*, the Supreme Court struck down the 3-year mandatory minimum jail sentence for this offence because it captures a wide array of conduct. The Court noted that a 3-year jail sentence for a person who *is not* an “outlaw” and who does not carry a loaded firearm in public places as a tool to commit crimes may be “disproportionate.”<sup>90</sup>

84. Justice Nakatsuru's finding that the Respondent's flight from the police was influenced by fear and distrust of the police<sup>91</sup> was reasonable based on the evidence before him.<sup>92</sup> That fear and distrust was confirmed by several persons interviewed familiar with Morris's area. It is established in the professors' report citing numerous studies. The legitimate basis for fear of the police by Black people is documented in the most recent human rights commission report, which was cited with approval by the Supreme Court in *Le, supra*:

[93] Overall, the OHRC expressed serious concerns. The study revealed that “Black people are much more likely to have force used against them by the TPS that results in serious injury or death” and between 2013 and 2017, a Black person in Toronto was nearly 20 times more likely than a White person to be involved in a police shooting that resulted in civilian death (p. 19). The OHRC report reveals recurring themes: a lack of legal basis for police stopping, questioning or detaining Black people in the first place; inappropriate or unjustified searches during encounters; and unnecessary charges or arrests (pp. 21, 26 and 37). The report reveals that many had experiences that have “contributed to feelings of fear/trauma, humiliation, lack of trust and expectations of negative police treatment” (p. 25).

---

<sup>89</sup> Appeal Book, Social History Report at pp 165-167, 173; Reasons for Sentence, at page 234 para. 46 and at page 243 para. 78

Appeal Book, Social History of Kevin Morris at pages 162-167, 169, 173-174.

<sup>90</sup> *R. v. Nur* [2015 SCC 15](#) at para. 82; see also Justice Spies position on what constitutes “true crime” in *R. v. Kabanga* [2019 ONSC 1161](#) at para. 96

<sup>91</sup> Appeal Book, *R. v. Morris* 2017 ONSC 4298- Charter decision at page 183 para. 10

<sup>92</sup> Sentencing Reasons para. 66 p. 14, Appeal Book p. 238

85. It is a reasonable conclusion that the Respondent's distrust or fear the police, contributed to flight. It was reinforced when they ran over his foot. The discarding of the gun occurred during that flight *after* having been struck by the police vehicle.

86. Contrary to the Appellant's argument, the consideration of the Respondent's actions and moral blameworthiness in the context of the systemic racism he experienced and disabilities from which he suffers, resulted in a sentence that was both proportionate and just.

## 2. The Crown's Position of "At Least 3 years"

87. The Appellant argues that regardless of the reasonable findings of fact about Mr. Morris's background and the circumstances of the offence, he (and similarly situated persons) must receive at least 3 years in jail. This is akin to asking for a tariff or a de facto mandatory minimum. This approach offends the paramount sentencing norm that a sentence must be tailored to the offender. This approach to sentencing was rejected by the Supreme Court in *Nur* and *Lacasse*.<sup>93</sup>

88. Exemplary of the Crown's subjective approach to sentencing, the Appellant has modified the jail time sought from the position taken by the trial Crown. The trial Crown argued for 4.5 years in jail. The Crown on Appeal argues for "at least 3 years" in jail. Yet the Crown's factum does not explain why they leave the door open to a discretionary 1.5 year reduction. If it is in recognition of the extraordinary circumstances of Mr. Morris, then the "at least 3 years" is still not consistent with range of cases where individuals received lower sentences than 3 years based on less compelling circumstances, context and mitigation.

---

<sup>93</sup> *R. v. Nur*, [2015 SCC 15 \(CanLII\)](#); *R. v. Lacasse* [2015 SCC 64 \(CanLII\)](#) at para. 58

### 3. Denunciation, Deterrence and Fitness of the Sentence

89. First, the trial judge was clearly aware of the seriousness of gun violence and the aggravating circumstances of the offence.<sup>94</sup> The judge recognized the paramount sentencing principles of deterrence and denunciation.<sup>95</sup> However, they are not to be applied as blunt instruments mandating a certain sentence irrespective of the facts of the case. The deterrent and denunciatory effects are difficult to evaluate. Here the trial judge turned his mind to these factors and fairly applied them.

90. The Appellant argues that a 15 month jail sentence (before police misconduct is factored) is a manifestly unfit period of jail that does not sufficiently denounce and deter this conduct. However, several persons have received similar *or lesser* sentences than the Respondent for the same offence with arguably more aggravating features. That means the sentence is within reasonable outcomes and less onerous sentences have been used to deter and denounce. In several cases judges gave sentences ranging from 1 year to just under 2 years. Notably, some of these sentences were permitted to be served in the community via conditional sentences. Exemplary of wide range, John Snobelen, former Minister in the provincial government, received an absolute discharge. He later ran for the leadership of his party.

*R. v. Ishmael*, 2014 ONCJ 136 (CanLII); *R. v. Garton*, 2018 ONSC 544 (CanLII); *R. v. Rutledge*, 2015 ONSC 6625 (CanLII); *R. v. Shunmuganathan*, 2016 ONCJ 519 (CanLII); *R. v. Nuttley*, 2013 ONCJ 727 (CanLII); *R. v. Kelsy*, [2018] O.J. No. 3879; *R. v. Cadienhead*, [2015] O.J. No. 3125; *R. v. Williams*, 2011 ONSC 3914 (CanLII), [2011], O.J. No. 3352 (S.C.J.); *R. v. Brown*, [2006] O.J. No. 4681 (S.C.J.); *R. v. Carranza*, [2004] O.J. No. 6041 (S.C.J.); *R. v. Smickle*, 2014 ONCA 49 (CanLII) at para. 19; *R. v. Filian-Jiminez*, 2014 ONCA 601; *R. v. Prosser*, 2014 ONSC 6466 at para. 54; *R. v. Auerswald* 1976 CarswellOnt 1036, [1975] O.J. No. 1258, 28 C.C.C. (2d) 177 (C.A.) *R. v. Snobelen*, [2008] O.J. No. 6021 (C.J.). *R. v. Reyes*, 2018 ONCJ 185 (CanLII) at para 43;

---

<sup>94</sup> Sentencing Reasons at paras. 50-52, 62-64, pp.11-13, Appeal Book at p. 236-237

<sup>95</sup> In *Nur* the Supreme Court cautioned that, “*doubts concerning the effectiveness of incarceration as a deterrent have been long standing...*” *R v Nur*, [2015] 1 SCR 773 at para 4. Fifteen years earlier in *Proulx*, the Court acknowledged that the deterrent effect of incarceration is uncertain. *R v Proulx*, [2000] 1 SCR 61 at para 107.

*R. v. Boussoulas*, [2015 ONSC 1536 \(CanLII\)](#); *R. v. Molin*, [2015 ONSC 7045 \(CanLII\)](#); *R. v. James and Dawson*, [2017 ONSC 473 \(CanLII\)](#);

91. Second, the judge was mindful that the pre-sentencing materials presented about the Respondent distinguished him from many others previously sentenced for the same offence. For instance, the trial judge in *Nur*<sup>96</sup> a case that is 8 years old, dealt with different facts, did not receive an IRCA report or have the benefit of current scholarly, human rights and correctional investigator reports. The judge in the Respondent's case had a duty to account for the distinctions. Notably, even in the absence of such compelling information about the offender and current reports, in *Smickle*, Doherty J.A. ruled that a sentence around 2 years less a day is appropriate for a first-time offender whose conduct is relatively less aggravating than other cases. Still, that ruling is not a mandatory directive irrespective of the individual's circumstances.<sup>97</sup>

92. Third, the sentence imposed cannot be said to meet the high legal standard of being manifestly unfit especially in the distinct circumstances of this case.<sup>98</sup> The Respondent's sentence was still 15 months in jail. Even if the general range of 2 years is suggested for a young first time offender with mitigating factors, then the difference is 9 months. The Appellant argues that the above noted cases involving less jail had significant mitigation or were "unique" yet fails to give a fair consideration to the exceptionality of the Respondent's life experiences.

93. Understood from a broader perspective, denunciation and deterrence are satisfied by a 15 month jail sentence. This is a significant reformatory sentence that sends a message that the crime will be faced by harsh consequences of jail, *even for the most disadvantaged offender*. There is

---

<sup>96</sup> *R. v. Nur* [2011 ONSC 4874](#) where a sentence of 40 months was imposed and upheld, but the constitutionality of the man min of 3 years was struck down as contrary to section 12.

<sup>97</sup> Sentencing, 9th Ed. (Ruby, Chan, Hasan, Eneajor; Chapter 23 Range of Sentence)

<sup>98</sup> *R. v. Smickle*, [2014 ONCA 49](#) (CanLII) at para. 19

no doubt that a 15 month jail sentence for a person with serious disabilities like Mr. Morris will be very harsh.

#### 4. Remorse:

94. This judge who serves on the front lines, was entitled to factor the human part of the hearing and the Respondent's remorse. After the most intimate details of his life were laid out bare before the court and members of the public, tears streamed down his face as he apologized and took responsibility for the pain he had caused. This anguish is not captured in any transcript. The judge found he was remorseful. He previously expressed regret for the path he had taken in his interview with Ms. Sibblis. Further, the judge found he was overwhelmed and showed regret when he testified on the stay application.<sup>99</sup> This should not be second guessed.

#### 5. Aggravating and Mitigating Factors Including Police Misconduct:

95. The judge methodically reviewed both the aggravating and mitigating factors. His lengthy discussion of these factors demonstrates consideration of each one of the factors the Appellant notes in his factum. He assessed the Respondent fairly and applied the law carefully.

96. The trial judge correctly factored the Respondent's injury to his left foot which the police officer's dangerous use of his vehicle caused. The judge also factored the denial of the Respondent's right to counsel. A modest 3 month deduction was granted but could have been higher due to aggravating features. Medical records confirmed Morris was taken to the hospital and was in pain, requiring crutches<sup>100</sup> The judge was clear that although he did not find the misconduct warranted a stay of proceedings which is subject to a high test, it was deserving of

---

<sup>99</sup> Sentencing Reasons at para. 72, p. 15, Appeal Book at page 239.

<sup>100</sup> Respondent's Appeal Book, Sentencing Record Addendum, Tab 36 at p. 160-163, Hospital Record.

recognition in the sentencing. The judge was permitted to revisit and clarify his findings on the stay application when determining the different issue of sentence.<sup>101</sup>

97. Contrary to the Crown's argument, the trial judge did not reduce the sentence for the police misconduct because of racism. The judge correctly noted that the impact of the police misconduct added to the Respondent's negative perception of the police. He also acknowledged the context and that he cannot be certain that this would have happened if the Respondent was not Black. As noted above, Black people are disproportionately subject to use of force by the TPS. However, it was clearly the negligent and dangerous conduct resulting in injury that accounted for the 90 day reduction in sentence.

[91] What made it particularly bad is that even on his own evidence, D.C. Moorcroft was not going to arrest you. He was just going to detain you for further investigation. This is not a very good reason for driving the way he did. It was foreseeable that something awfully tragic could have happened. Thankfully, it did not. But you did suffer an injury to your foot. You were clearly in pain. After the adrenaline of the chase and arrest wore off, that pain overwhelmed you, as the video of you in the police cruiser showed. You were taken to the hospital. You received a soft cast and crutches. While, fortunately, you did not suffer lasting injury, I cannot ignore the pain and suffering that was caused to you by D.C. Moorcroft's actions.

[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: 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.

[94] It is also important that I look at these violations from your point of view. As a young Black man who has not had good interactions with the police, and who sees the police with mistrust and fear. The interaction that night will do little to change this.

[95] I find that these factors are related to your offences and to you. This is not a remedy that I am granting under the *Charter*. Rather, they are relevant considerations to

---

<sup>101</sup> Sentencing reasons at paras. 88-92, p. 18, Appeal Book at page. 242.

the sentencing framework in the *Criminal Code*. These violations are connected in time to the crime you committed. They are relevant to my assessment of the gravity of your actions, in particular, the flight from the police. There was real physical harm suffered by you. I cannot condone the police officer's actions. All of this supports mitigation of your 15-month sentence.

98. Consideration of police misconduct in determining sentence is consistent with several Supreme Court rulings. In *R v Nasogaluak*, [2010 SCC 6](#) at para 3 the Court held:

[3] As we shall see, the sentencing regime provides some scope for sentencing judges to consider not only the actions of the offender, but also those of state actors. Where the state misconduct in question relates to the circumstances of the offence or the offender, the sentencing judge may properly take the relevant facts into account in crafting a fit sentence, without having to resort to s. 24(1) of the *Charter*. Indeed, state misconduct which does not amount to a *Charter* breach but which impacts the offender may also be a relevant factor in crafting a fit sentence.<sup>102</sup>

99. More recently in *R. v. Suter*, [2018 SCC 34 \(CanLII\)](#) the Court held that an offender who suffers unjustified violence as a consequence of their commission of the offence may receive a reduction of an otherwise appropriate sentence. In particular in the Court held that:

[46]... Tailoring sentences to the circumstances of the offence and the offender may require the sentencing judge to look at collateral consequences. Examining collateral consequences enables a sentencing judge to craft a proportionate sentence in a given case by taking into account *all* the relevant circumstances related to the offence and the offender.

[53]:.. violent actions against an offender for his or her role in the commission of an offence ... necessarily form part of the personal circumstances of that offender, and should therefore be taken into account when determining an appropriate sentence.

#### **4. Conditions and Mistreatment in Jail:**

98. The Respondent's harsher experience in jail due to physical, learning, and mental health disabilities is relevant to the quantum of jail time imposed. Due to his vulnerabilities, 15

---

<sup>102</sup> *R v Nasogaluak*, [2010 SCC 6](#) at para 3; *R. v. Acheampong*, [2018 ONCJ 798](#) at paras. 67-72; see also *R. v. Omar*, [2019 SCC 32](#) the Supreme Court discussed but did not settle on whether *Charter* breaches could result in remedies other than exclusion of evidence or a stay, such as a reduction in sentence for state misconduct.

months jail for Mr. Morris is a significant period of hard time. On that basis alone, he is distinguishable from other persons sentenced for this offence that do not suffer from those conditions.

99. With respect to the systemic mistreatment of Black inmates, the judge was entitled to consider recent data from the federal government that clearly documents over-representation and mistreatment of Black persons in jail.<sup>103</sup> This information was contained in the professors' report and is contained in several correctional investigator reports.<sup>104</sup>

100. A judge's application of the sentencing principle of restraint in relation to a first time, young, marginalized Black person must be informed by the over-representation and mistreatment of Black persons in federal prisons.<sup>105</sup>

101. Between 2005 and 2015, the Black inmate population grew by 69%.<sup>106</sup> The federal incarceration rate for Blacks is three times their representation rate in general society.<sup>107</sup> These increases continue despite public inquiries and commissions calling for change and Supreme Court of Canada decisions urging restraint.<sup>108</sup> Black inmates are one of the fastest growing sub-

---

<sup>103</sup> Appeal Book, Expert Report of Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario, pages 139-141, 144-147.

<sup>104</sup> Appeal Book, Expert Report of Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario, pages 139-141, 144-147. See also [A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report](https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx#s4) <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx#s4> at paras. 54-55; see also *R. v. Jackson* [2018 ONSC 2527](https://www.onsc.on.ca/decisions/2018/2018-01-25-2527) at paras. 40-54

<sup>105</sup> Section 718 to 718.2(e) of the Code states that proportionality and restraint are essential sentencing principles. This is especially true for the marginalized and over-represented.

<sup>106</sup> The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2013-2014*, online: <<http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20132014-eng.aspx>> at 2; The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2014-2015*, online: <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20142015-eng.pdf>> at 2, 27, 30; The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2015-2016*, online: <<http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20152016-eng.aspx>> at 8, 61-62.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

populations in federal corrections.<sup>109</sup> Over the last 10 years, the number of federally incarcerated Black inmates has increased by 80%.<sup>110</sup> Black inmates account for 9.8% of the prison population while representing just 2.9% of the general Canadian population.<sup>111</sup>

102. Likewise, to derive a proportionate sentence a judge must consider the harsher conditions in jail for Black people. Differential treatment for Black people in jail violates their human rights and exacerbates their experiences with anti-Black racism in the community. Black inmates are over-represented in jail guard ‘use of force’ incidents. They are also over-represented in segregation placements.<sup>112</sup> Despite being rated as a population with a relatively low risk of re-offending, Black inmates are 1.5 times more likely to be placed in a maximum security institution where programming, employment, education, rehabilitation and social activities are limited.<sup>113</sup> They are also less likely to have their custody rating scale score overridden in favour of a placement in a medium or even minimum-security institution.<sup>114</sup>

103. Finally, they are also less likely to get parole. Statistics over the 5 years (2007/08 to 2011/12) show that Black offenders have consistently been less likely than the general inmate population to be granted federal day or full parole. This means that many Black offenders serve longer sentences. This is despite the fact that once released, successful completion rates for both federal day and full parole were consistently higher for Black offenders.<sup>115</sup>

---

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2014-2015*, *supra* at 27, 30; The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2012-2013*, online: < <http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx>> at 7-10. *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report* <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx#s4> at paras. 54-55

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*, Case Study on Diversity in Corrections at para. 65 to 67.

104. Overall, sentencing must adapt to recognize the distinct Black inmate experience. Sentencing for Black people is not just, if it fails to consider that they are more likely to experience prolonged and worse jail conditions. These conditions cause long-term deleterious effects and perpetuate socio-economic disadvantage. These conditions also undermine rehabilitation and reintegration. The idea that such application amounts to a “race based discount” should be flatly rejected. In *Ipeelee*, the Court held that the sentencing process is an appropriate forum in which to address the ill effects of over-representation in prisons.<sup>116</sup>

105. The over-representation of Black people in criminal justice and pre-trial custody is now a statutory relevant factor on bail pursuant to the recent Criminal Code amendments.<sup>117</sup> Similarly, a sentence must factor not just the nature of the crime, but also the impact of the jail sentence on the individual and the community.”<sup>118</sup>

**PART III – ADDITIONAL ISSUES**

106. None.

**PART IV – ORDER REQUESTED**

107. The Sentence Appeal be dismissed.

108. The Respondent has been granted 1 hour 10 minutes for oral submissions.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20<sup>th</sup> DAY OF August, 2019**

---

**Faisal Mirza**  
**Gail D. Smith**

---

<sup>116</sup> *R v Ipeelee, supra* at paras. 70-75; see also *R. v. Reid* [2016 ONSC 8210](#) at para. 26-27.  
<sup>117</sup> Recently, [Bill C-75](#) and amended the Criminal Code including the law of bail to recognize the over-representation of vulnerable groups in pre-trial custody. The amendments “require that circumstances of Indigenous accused *and of accused from vulnerable populations are considered at bail, in order to address the disproportionate impacts that the bail system has on these populations.*”  
<sup>118</sup> *R v M (C)*, [\[1996\] 1 SCR 500](#) at para 91; *R v Proulx, supra* at para 44 (SCC); *R v Nasogaluak, supra* at para 44.

## SCHEDULE A - AUTHORITIES CITED

Case Law	Paragraphs
<i>R. v. Morris</i> , <a href="#">2018 ONSC 5186</a>	30, 46, 47, 50-52, 56, 62, 63-64, 72, 74, 75, 76, 77, 78, 90-96, 97
<i>R. v. RDS</i> <a href="#">[1997] 3 SCR 484</a>	38-59
<i>R. v. Le</i> , <a href="#">2019 SCC 34</a>	71, 93-94, 96
<i>R. v. Parks</i> , <a href="#">[1993] O.J. No. 2157</a>	46-48
<i>R. v. White Burgess Langille Inman v. Abbott and Haliburton Co.</i> , <a href="#">2015 SCC 23</a> (CanLII)	
<i>R. v. Abbey</i> , <a href="#">2017 ONCA 640</a> (CanLII)	
<i>R. v. Morris</i> , <a href="#">2017 ONSC 4298</a> (CanLII)	6, 10, 32, 38
<i>R. v. Borde</i> , <a href="#">(2003) 63 OR (3d) 417</a> (ONCA), <a href="#">2003 CanLII 4187</a> , <a href="#">172 CCC (3d) 225</a>	27, 32
<i>R. v. Hamilton</i> , <a href="#">72 OR (3d) 1 [2004] OJ No. 3252 (C.A.)</a> .	137
<i>R. v. Rage</i> , <a href="#">2018 ONCA 211</a> (CanLII)	13
<i>R. v. Lacasse</i> , <a href="#">2015 SCC 64</a> (CanLII)	11-12, 44-46, 58
<i>R. v. M.(C.A.)</i> , <a href="#">[1996] 1 SCR 500</a>	90, 91
<i>R. v. Shropshire</i> , <a href="#">1995 CanLII 47</a> (SCC), <a href="#">1995 CanLII 47</a> (SCC), <a href="#">[1995] 4 S.C.R. 227</a> , <a href="#">102 C.C.C. (3d) 193</a>	
<i>R. v. McGill</i> , <a href="#">2016 ONCJ 138</a>	82
<i>R. v. Nasogaluak</i> , <a href="#">2010 SCC 6</a>	3, 44
<i>R. v. Pelletier</i> , <a href="#">2016 ONCJ 628</a>	8, 13 to 18, 22, 25
<i>R. v. Armitage</i> , <a href="#">2015 ONCJ 64</a>	14-22
<i>R. v. Brown</i> , <a href="#">2003 CanLII 52142</a> (ON CA)	44 to 49
<i>R. v. Spence</i> , <a href="#">[2005] 3 S.C.R. 458</a>	57, 65
<i>R. v. Jackson</i> , <a href="#">2018 ONSC 2527</a>	82, 123
<i>R. v. "X"</i> , <a href="#">[2014] N.S.J. No. 609</a>	75, 189, 193, 198, 252
<i>R. v. Gabriel</i> , <a href="#">[2017] N.S.J. No. 125</a>	
<i>R. v. Perry</i> , <a href="#">2018 NSSC 16</a>	21-26
<i>R. v. N.W.</i> , <a href="#">2018 NSPC 14</a>	131-136

<i>J.C. (Re)</i> , <a href="#">2017 NSPC 14</a>	39
<i>R. v. T.J.T.</i> , <a href="#">2018 ONSC 5280</a>	42-47, 53, 78-82
<i>R. v. Ferguson</i> , <a href="#">2018 BCSC 1523, 150 W.C.B. (2d) 738</a>	120-129
<i>R. v. Brissett and Francis</i> , <a href="#">2018 ONSC 4957, 149 W.C.B. (2d) 680</a>	61-71
<i>R. v. Bryce</i> , <a href="#">2016 ONSC 7897</a>	
<i>R. v. Elvira</i> , <a href="#">2018 ONSC 7008</a>	21-26
<i>R. v. Williams</i> , <a href="#">2018 ONSC 5409</a>	45-47
<i>R. v. F.L.</i> <a href="#">[2018] OJ No 482 (C.A.)</a>	40
<i>R. v. Ipeelee</i> , <a href="#">[2012] 1 SCR 433</a>	70, 77
<i>R. v. Gladue</i> , <a href="#">[1999] 1 SCR 688</a>	69
<i>Peel Law Association v. Pieters</i> , <a href="#">2013 ONCA 396</a>	58-60
<i>R. v. Nur</i> <a href="#">2015 SCC 15</a>	4, 82
<i>R. v. Kabanga</i> <a href="#">2019 ONSC 1161</a>	96
<i>R. v. Proulx</i> , <a href="#">[2000] 1 SCR 61</a>	44, 107
<i>R. v. Ishmael</i> , <a href="#">2014 ONCJ 136 (CanLII)</a>	
<i>R. v. Garton</i> , <a href="#">2018 ONSC 544 (CanLII)</a>	
<i>R. v. Rutledge</i> , <a href="#">2015 ONSC 6625 (CanLII)</a>	
<i>R. v. Shunmuganathan</i> , <a href="#">2016 ONCJ 519 (CanLII)</a>	
<i>R. v. Nuttley</i> , <a href="#">2013 ONCJ 727 (CanLII)</a>	
<i>R. v. Kelsy</i> , <a href="#">[2008] O.J. No. 3879</a>	
<i>R. v. Cadienhead</i> , <a href="#">[2015] O.J. No. 3125</a>	
<i>R. v. Williams</i> , <a href="#">2011 ONSC 3914 (CanLII)</a>	
<i>R. v. Brown</i> , <a href="#">[2006] O.J. No. 4681 (S.C.J.)</a>	
<i>R. v. Carranza</i> , <a href="#">[2004] O.J. No. 6041 (S.C.J.)</a>	
<i>R. v. Smickle</i> , <a href="#">2014 ONCA 49 (CanLII)</a>	19
<i>R. v. Filian-Jiminez</i> , <a href="#">2014 ONCA 601</a>	
<i>R. v. Prosser</i> , <a href="#">2014 ONSC 6466</a>	54
<i>R. v. Auerswald</i> , <a href="#">1976 CarswellOnt 1036, [1975] O.J. No. 1258, 28 C.C.C. (2d) 177 (C.A.)</a>	
<i>R. v. Snobelen</i> , <a href="#">[2008] O.J. No. 6021 (C.J.)</a>	

<i>R. v. Acheampong</i> , <a href="#">2018 ONCJ 798</a>	67-72
<i>R. v. Omar</i> , <a href="#">2019 SCC 32</a>	
<i>R. v. Suter</i> , <a href="#">2018 SCC 34 (CanLII)</a>	46, 53
<i>R. v. Reid</i> <a href="#">2016 ONSC 8210</a>	22-27

## Legislation

	<b>Sections</b>
<i>Criminal Code</i> , RSC 1985, c. C-46	721, 723, 724, 726

## Secondary Sources

<a href="#">Confronting Anti-Black Racism Update</a> . (2019). Update on Toronto Action Plan to Confront Anti-Black Racism.	
Expert Report of Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario	Appeal Book at pp. 129, 139-141, 144-147
<a href="#">2018 Toronto Child &amp; Family Poverty Report</a> .	p. 8
<a href="#">Report of the Commission on Systemic Racism in the Ontario Criminal Justice System</a> . 1995. Commissioners: Margaret Gittens, David Cole, Toni Williams, Sri-Guggan Sri-Skanda-Raja, Moy Tam, Ed Ratushny.	Chapters 2-6, 8.
<a href="#">Independent Street Checks Review. 2018. The Hon. Mr. Justice Tulloch. Chapter 2</a> (Tulloch Report)	pp. 41-42
Ontario Human Rights Commission. <i>A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service</i> . Government of Ontario, November 2018	pp. 19, 21, 25-26, 37
Sentencing, 9th Ed. (Ruby, Chan, Hasan, Enenajor)	Chapter 23 Range of Sentence
The Correctional Investigator Canada, <a href="#">Annual Reports of the Office of the Correctional Investigator 2013-2014</a>	p. 2
The Correctional Investigator Canada, <a href="#">Annual Reports of the Office of the Correctional Investigator 2014-2015</a>	pp. 2, 27, 30
The Correctional Investigator Canada, <a href="#">Annual Reports of the Office of the Correctional Investigator 2015-2016</a>	pp. 8, 61-62
The Correctional Investigator Canada, <a href="#">Annual Reports of the Office of the Correctional Investigator 2012-2013</a>	pp. 7-10
A Case Study of Diversity in Corrections: <a href="#">The Black Inmate Experience in Federal Penitentiaries Final Report</a>	pp. 54-55, 65-67
The Correctional Investigator Canada, <a href="#">Annual Reports of the Office of the Correctional Investigator 2016-2017</a>	42, 55-57

The Correctional Investigator Canada, <a href="#">Annual Reports of the Office of the Correctional Investigator</a> -2017-2018	74
Culture, community and sentencing: culturally competent pre-sentence reports.; by Faisal Mirza.; (Nov. 2017) 38 For the Defence No. 3.	pp. 34-39
The Review of the Roots of Youth Violence	pp. 77-79