

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
HER MAJESTY THE QUEEN) *Anita Kocula*, for the Crown
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– and –)
)
KEVIN MORRIS) *Gail Smith* and *Faisal Mirza*, for Defendant
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Defendant)
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) **HEARD:** July 19, 2018
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JUSTICE S. NAKATSURU:

A. INTRODUCTION

[1] Mr. Morris, these are my written reasons explaining why I gave you the sentence that I did. I also know that my reasons must explain the sentence to the Crown, and perhaps most importantly, to the public. Before I begin, I will be frank. I know that some may accuse me of being soft on crime. On gun crime. I do not believe that is so. Let me explain.

[2] A jury found you guilty of a number of offences. I convicted you of possession of an unauthorized firearm, possession of a prohibited firearm with ammunition, and carrying a concealed weapon. The jury acquitted you of assaulting a peace officer with intent to resist arrest.

[3] The basic facts of your crime are straightforward. On December 13, 2014, the police received a call about a home invasion in Scarborough. As the police officers sent to investigate drove to the scene, they came upon four Black males walking in the parking lot. The officers were in plainclothes and drove unmarked police cars. One officer stopped the young men. You were one of them. You ran. As you ran, D.C. Moorcroft, who was not the officer who stopped you but was also driving into the lot, accelerated to stop you. There was a collision between you and his car. Your foot was run over. Still, you were able to get up and continue running. You jumped over a fence into the parking lot of a shopping mall. There, uniformed officers

responding to the call saw you. From a distance, they saw you duck into a shadowy area outside of a large grocery store. Moments later, they saw you come back up without the jacket you had been wearing. A uniformed officer gave chase on foot and eventually caught you. The area where you had disappeared from view was a small stairwell that went down towards a locked door. It appeared unused due to the garbage found at the bottom of the stairwell. Your jacket was found there in a small pool of water. In the jacket was a loaded revolver.

[4] The jury found you guilty of these facts.

[5] At this point, I should also add that prior to your trial, you brought a *Charter* application to stay the charges. I did not. But I did find some *Charter* violations. These are relevant to your sentencing. I will return to this issue later in my reasons.

[6] I must now sentence you for your offences. Let me go over what the Crown and your defence lawyers said should be the sentence. These positions were pretty far apart. The Crown asked for 4 to 4.5 years in jail. Your lawyers argued that the sentence should be 1 year before credit was given for the *Charter* breaches.

[7] The Crown and your lawyers also asked me to take very different approaches to your sentencing. Your lawyers asked me to take an approach that takes into account the problem we have in the unfair and disproportionate jailing of Black offenders. This is what I did in a case I decided in April of this year. The case is *R. v. Jackson*, [2018] O.J. No. 2136; 2018 ONSC 2527. The Crown did not expressly disagree with this approach, but argued that the principles of sentencing as traditionally applied supported her position on sentence.

[8] I sentenced you to 15 months in jail. After considering the effect of the *Charter* breaches, I reduced that sentence to 1 year. I did the same analysis for you as I did for Mr. Jackson.

[9] Let me briefly explain to you what I did in *Jackson*. I began my judgment in that case by saying sentencing is a very individual process. The criminal law has recognized that there are cases where, in order to determine a fit and proportionate sentence, consideration must be given to an individual's systemic and social circumstances. These circumstances may extend beyond a person who is being sentenced to include factors such as systemic discrimination and historical injustice. This has been recognized by the criminal courts, particularly in the case of Indigenous offenders. While the distinct history of colonial violence endured by Indigenous peoples cannot simply be analogized to Black Canadians, I found that the ability to consider social context in a sentencing decision is extended to all under section 718.2(e) of the *Criminal Code*. This allowed me to consider the unique social history of Black Canadians in sentencing Mr. Jackson. Mr. Jackson was a Black male offender not too much older than you, who pleaded guilty to a charge of possession of a prohibited gun. His lawyers presented a great deal of evidence to me on systemic anti-Black racism and its role in Mr. Jackson's life. I took note of this evidence. I also took judicial notice, independently of these materials, of the history of colonialism, slavery, policies and practices of segregation, intergenerational trauma, and both overt and systemic racism that continue to affect Black Canadians today. With an understanding of these social

factors I was able to better appreciate the circumstances that led Mr. Jackson to come before me. I sentenced him accordingly.

[10] This approach led to a result that I suspect Mr. Jackson was not pleased with. I sentenced him to 6 years for his first possession of a loaded handgun, which is a very long time. But the Crown was asking for more. The evidence and the approach in his case moved the needle to a lower sentence. But not as low as he wanted. For you see, it was not really his first gun charge. He had been convicted of prior robberies using guns. His case was different from yours. He is different from you. As these reasons will show.

[11] At the moment, Mr. Morris, you are in jail. You have spent some 500 days in jail. You are detained on these charges. You were released on bail, but new charges brought you back into jail. Your sentencing was delayed for a number of reasons. This was the reason why I sentenced you on July 19 with these written reasons to follow. It would not have been fair for you to wait any longer for my decision.

[12] Before I get to that, I need to explain why I admitted two reports you presented to me at this sentencing hearing. The Crown took objection to their admission and how they would be used by me. I need to explain that in this decision as well.

B. THE ADMISSION OF THE DEFENCE REPORTS

[13] The defence gave me two reports. One deals with anti-Black racism in Canadian society. The other deals with your social history.

[14] These reports are written by Professor Akwasi Owusu-Bempah, Ms. Camisha Sibblis, and Professor Carl James. They are all very qualified academics and experts in their field.

[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 has given countless conference presentations, received many grants, and is a sought after person in the media. His C.V. is thick. It is impressive. He is an expert in the experiences of racialized young people, particularly with regards 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.

[17] Camisha Sibblis 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 Black male identity and trajectory. She has a post-graduate certification in therapy. She has published articles in both refereed publications and other publications about racism, education, and Black youth. She has taught at universities and colleges. She has clinical experience in schools, Children's Aid Societies, and the Office of the Children's Lawyer.

[18] The three have co-authored both reports given to me at this sentencing. However, Ms. Sibblis was the primary author of the "Social History of Mr. Morris", although Professors James and Owusu-Bempah reviewed and agreed with it. Let me now deal with the contents of the reports and their admissibility.

Report #1: "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario."

[19] The defence asked the authors of this report to outline and analyze the research relating to the existence and impact of anti-Black racism in Canadian society in general and the Toronto region in particular. The aim of the report was to help me understand the conditions under which many Black people reside, receive education and employment, experience crime and the criminal justice system, and suffer from various forms of discrimination. Along with the "Social History of Mr. Morris", it was designed to help me understand the social conditions and context that may have led to your involvement in the offences.

[20] The Crown objected to the admissibility of this report at this sentencing hearing. The core of her objection is that it was not necessary. She argued that the law has now long taken notice of these sorts of things. Experts were not required for me to consider them.

[21] I agree. Indeed in *Jackson*, I found that judicial notice should be taken of the things that Professor James, Professor Owusu-Bempah, and Ms. Sibblis discuss in this report. At the same time, I recognize how important it is to have these issues concerning racism and discrimination explained well for the education of judges, lawyers, and the public. This report describes it very well. It is very well researched. I believe it to be so useful that I am attaching it as Appendix A to my reasons. It is invaluable to have such a report available for every judge on every sentencing of a Black offender. I found it to be so in mine.

[22] Also, I agree with the authors' conclusions. Although it is a lengthy series of passages, I will set out in full these conclusions:

As documented above, Black Canadians present experiences are rooted in our country's history of colonialism, slavery and segregation. These systems, the latter of which existed well into the 20th century in Ontario, were premised on the idea that Black people are inherently inferior. These systems also served to

structure the nature of early social relations in Canadian, while at the same time shaping the economic and political landscape. While White Canadians were provided opportunity to access good schools, good jobs and representation in political office, Black Canadians were largely relegated to the margins of Canadian society.

These early experiences of Black Canadians has informed the experiences of those that have come after them. Stereotypical notions about Black intellectual inferiority, the pathological nature of Black families and of Blacks' supposed innate propensity for crime, all rooted in this early period, continue to influence how Black people are treated today. The data documented above demonstrate that Black children are disproportionately removed from their families, due in part, to discrimination in child welfare assessments. Black children are deemed to be less academically inclined and thus streamed into non-university tract programs. They are also subject to harsher discipline in schools which reduces their likelihood of graduation. In the employment sector, Black people face discrimination in hiring, and at times, earn less money for similar work performed by White Canadians, resulting in increased rates of unemployment and poverty. The increased representation of Black people in impoverished neighborhoods means that they have less access to good schools, community centers and health facilities. They are also exposed to the harsher forms of policing practiced in marginalized neighborhoods in response to problems of crime and violence.

Importantly, Blacks' negative treatment by these institutions, and the disparate outcomes experienced within them, are cyclical and compounding. Indeed, increased exposure to the child welfare system reduces the chances of academic success, which reduces employability, thus increasing levels of poverty. These circumstances are passed from generation to generation.

The data documented above also clearly demonstrate that Black Canadians, and young Black men in particular, keenly feel the discrimination they experience at the hands of the criminal justice system. Young Black Canadians are not only over-represented in stop, search and carding practices of local police, but they serve longer periods of time in pre-trial detention, resulting in longer periods of incarceration than are others charged with the same or similar crimes. Not surprisingly, as Owusu-Bempah (2014) has found, Black male youth who perceive discrimination in policing also feel the same way about both the educational and employment sectors. Further, as Khenti (2013) notes, their experiences, personal and vicarious, with the criminal justice system contribute to the perception that they live "socially unjust lives." The conclusion is inescapable – that young Black Canadians who view the system as unjust are less likely to believe they should abide by that system's rules.

It is our opinion that the social circumstances of Black Canadians in general, and of Black male Torontonians in particular, should be viewed as criminogenic. Elevated levels of offending in the types of crime that typically come to the attention of the police (street crimes as opposed to white-collar and corporate crimes), combined with discrimination in the justice system itself have resulted in the gross over-representation of Black Canadians in our provincial and federal correctional systems. Whereas no one individual should be completely absolved of their own responsibility when it comes to offending behavior, the social realities that have produced or contributed to such behavior can be acknowledged, and serve to guide judicial decision making.

Report #2: “Social History of Kevin Morris.”

[23] As I have said, Ms. Sibblis was the main author of this report. In this report, her stated goal was to provide me with information about you, Mr. Morris. It was also to provide me with her analysis as to the impact of systemic racism on your experience in and out of the justice system. The Crown objected to the admissibility of this report. She submitted that it is unclear what the scope of Ms. Sibblis’s “expertise” was and the nature of the opinion she was offering. The Crown was also concerned about the reliability of this report.

[24] I admitted this report. This is a sentencing hearing. Sentencing judges take a broader and more liberal view of the materials that should be admissible at such a hearing. This is vital since the goal is to arrive at a fit and proportionate sentence. The more I know about you and your crimes, the better can I arrive at such a fit sentence. This is particularly important when it comes to tackling the problem of the disproportionate imprisonment of Black offenders. If we cannot have resort to such materials, we will never begin to do better.

[25] In *Jackson*, I commented upon the use of such reports. In that case, it was called an “Impact of Race and Cultural Assessment”. In this case, it is two reports. The one specifically about you is called the “Social History of Mr. Morris.” It really does not matter what these reports are called.

[26] The Crown in *Jackson* did not object to my considering the report. The Crown objected here. There is nothing wrong in that. However, it is my view that such reports should not have to meet the strict requirements of the admissibility of “expert” evidence as the Crown argued, as it is set out in the legal cases. These reports serve a very different purpose. They provide personal, social, cultural, and historical context for the sentencing. In my opinion, to follow the type of exacting inquiry into their admissibility called for by the Crown would only serve as a systemic barrier to tackling the problem at hand. It will be yet another form of systemic racism.

[27] Ms. Sibblis is a very qualified social worker. She is also very knowledgeable in the area of anti-Black racism. Further, she interviewed Mr. Morris, his mother, and two other personal sources who have known him since childhood. She also had access to a wealth of school and medical documentation. These were also provided to me as a part of the sentencing record. Ms.

Sibblis' report is over twenty pages long. In addition, it is supported by Report #1, "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario". I point all this out to show how thorough the reports presented to me are. Indeed, I will say in my many years as a judge, I have seldom come across so much information presented to me at a sentencing hearing in general let alone materials specific to the issue of anti-Black racism and a Black offender.

[28] I quickly want to say that it will do an injustice if my decision is read as somehow requiring the same diligence by the lawyers, quality of experts, or exhaustiveness of materials, before a sentencing judge can admit similar reports and/or take a more systemic approach in the sentencing of a Black offender. This is not required in other contexts. For example, our courts have now had much experience with *Gladue* reports. *Gladue* report writers come from varied backgrounds. They are trained to write such reports. The reports are different from case to case. To be truthful, some are better than others. That does not always have to do with the skill, training, or experience of the writer. Sometimes there is more information available. Sometimes the path for the analysis is clearer. However, judges do not demand an inquiry such as the Crown wished me to take in this case, before *Gladue* reports are admissible. To do that would overly complicate sentencing for no good reason. As I said, it would also be another form of systemic racism. Finally, we live in the real world of limited resources. There is a limit to what defence lawyers can bring to a single sentencing case amongst many. It should not be expected that they provide the kinds of materials that I have here. I certainly do not. But when I get this type of evidence, rather than putting up barriers to their admission, I gladly embrace them.

[29] I have little doubt that the criminal courts will welcome such reports. Let me note here that there was a pre-sentence report prepared in your case, Mr. Morris. The Crown rightfully points out that the *Criminal Code* gives a set of rules for their admission. Such statutory rules do not exist for a report like the one prepared by Ms. Sibblis. But the *Criminal Code* allows sentencing judges to get the appropriate materials. And the common law allows for judges to admit them and use them.

[30] Pre-sentence reports also offer a different view into a sentencing than your "Social History" does. Further, they too can suffer from institutional limits on resources and often are of uneven quality. I find that Ms. Sibblis's report to be much more detailed and useful than the pre-sentence report prepared for you. I agree with your lawyers that the pre-sentence report is not good enough. Not good enough in sentencing a Black offender. Indeed, not very good regardless of who the offender is.

[31] So I admitted the "Social History of Mr. Morris", but with some qualifications. The first is how I use it. Like any other sentencing material, while admissible, what the authors say is subject to my determination of its usefulness in sentencing. I use my own independent evaluation of how systemic factors apply in your case. I am grateful for the analysis done by Ms. Sibblis, but I am not bound by it. I am free to disagree with what she says.

[32] The second has to do with the fairness of the process. I permitted the Crown to cross-examine Ms. Sibblis. In fact, I allowed her to cross-examine Professors James and Owusu-Bempah. They were both here in court. However, the Crown only wished to question Ms. Sibblis. Fairness required that she be given that chance before I was to make use of the report.

[33] In that cross-examination, the Crown pointed out that Ms. Sibblis had not done a report like this before although she had done similar work in her role as a clinical social worker. Ms. Sibblis only got her information about Mr. Morris's offences from his defence lawyer. The Crown asked Ms. Sibblis questions about what she knew about Mr. Morris's schooling, the involvement of CAS, and his medical conditions. Ms. Sibblis agreed that she had not reviewed other records like those of Ontario Works, CAS, or his jail records. She was also cross-examined on some of the comments Mr. Morris made to her.

[34] At the end of the day, I found Ms. Sibblis to be fair. She stated she believed it was important that Mr. Morris have a voice in his sentencing. But she was not an advocate for him. Ms. Sibblis correctly, in my view, felt that Mr. Morris's experiences had validity. She used the information she got to explain how the theory around anti-Black racism was relevant in Mr. Morris's case.

[35] She also had access to quite a lot of information. While she relied upon what others told her, I found nothing about what she was told to be significantly untrue or misleading. The Crown did not seek to impeach these sources of information. The defence provided me with a lot of original materials that confirmed these sources. A number of sources were interviewed and what they said was consistent with each other.

[36] In short, Ms. Sibblis is smart and thoughtful. I found her conclusions helped me. They were sound. They made sense.

[37] So what did Ms. Sibblis say? I now know quite a bit about you. You are now 26 years old. You are of Jamaican heritage. I know about your mother and father's very modest backgrounds in Jamaica and how they made their way to this country. Your father's death when you were only 7 years old had a very profound and negative impact on you. Your mother worked very hard to raise you and your much older half siblings. Your siblings were not home as you grew up. Often neither was your mother given the jobs she had; including labor jobs like a cafeteria worker. Sometimes she was on welfare. She did everything she could to be as good a mother as she could be for you. While she tried her best, you never had male role model in your life to look up to, as you say, to "become a man." There was once a young man that you looked up to as a boy. But he was taken from you. He was shot.

[38] Your school years were hard and challenging. You changed schools many times. You were absent a lot. You were disciplined often, sometimes with suspensions. Your mother felt you were treated unfairly. She felt she too was treated unfairly because she was Black. The school contacted the CAS at times. You were identified as having an intellectual disadvantage. You had behavioral issues including anger, anxiety, and impulsiveness. You were placed in a

special needs school but you felt unsafe as you had to cross rivaling neighborhoods to get there every day. At one point, in 2009, you were incarcerated at the Roy McMurtry Youth Centre and were stabbed. You never graduated from high school although you tried to go back as an adult but had to stop attending classes due to another critical injury you suffered when you were stabbed walking in your neighborhood. You never worked after that stabbing. You did not do the programs Ontario Works wanted you to do because you felt some neighborhoods were just not safe for you.

[39] The Crown argued that you had academic and behavioral problems and that it was not simply that you were being labelled or targeted by the school. While this may be correct, I am mindful of the issues raised in Report #1 “Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario”. I have no doubt there were some systemic failures in your education. Bluntly, you felt like a failure. Perhaps you were made to feel like a failure. You clearly did not feel you got the help you needed. Your mother has felt the same way about your education. I can safely conclude that you did not get the help you needed.

[40] Mr. Erin, the pastor of your Church, described the neighborhood you lived in as having a reputation for being dangerous. People who lived there struggled to get by as it was plagued with the typical issues that affect inner city public housing complexes. There is a lot of crime. Of various sorts. Your nickname around the neighborhood was “Scrappy”, not because you enjoyed fighting, but because being small, you felt picked upon and had to stand up for yourself. You were involved in that Church and viewed it to be a safe haven for you and other youths. But by ten years of age you began to notice how many were dying in your neighborhood. Dying of violence. You did not have a lot of options. You decided you would live with it. That you would survive. Yet at the same time, you felt hopelessness. A hopelessness that you have admitted led to recklessness. A hopelessness from which there was no escape. That led to a feeling that a violent death potentially awaited you.

[41] Ms. Sibblis described the interactions between young Black men and the police in this same neighborhood. It is not a good relationship. There is no trust. Young Black men developed negative feelings towards the police. You, yourself, believed from your own experiences that the police were out to get you. You have long felt targeted by the police due to your Blackness. You regarded the police as uncaring and untrustworthy. They were not there to help you.

[42] In 2013, you were critically stabbed. As a result, your spleen and half of your pancreas were removed. You still suffer physical symptoms from this. You believe that someone who you felt to be a friend had set you up. In January of 2014, you were diagnosed by the psychiatrist of the Adult Mental Health Clinic at the North York General Hospital with Post-Traumatic Stress Disorder (“PTSD”) and paranoia with dysphoria and anxiety. You were never treated for the PTSD or paranoia. You reported to Ms. Sibblis that you do not feel you can find peace within yourself until you die. You cope by talking to your mother. You have few others in your life. Some of your friends have died, gone to prison, or become estranged while you have been in jail.

[43] What is more, I have learned about your character, Mr. Morris. From the people Ms. Sibblis talked to. It comes also from letters written on your behalf. As a result, I have a fuller picture of you. These people speak of many good qualities. About the goodness of your heart. Your kindness. Your loyalty. Your selflessness. Your ability to connect with people. Your empathy. Ms. Sibblis saw this too. But you are also a worrier. You do have a temper. You isolate yourself.

[44] You have also given some deeper thought to how Black people are sometimes treated differently. Why they seem to live in different neighborhoods. Why they don't seem to get the same chances as others.

[45] A recurring theme is how you make poor choices in friends. How you are influenced too easily by others. How you have a need to fit in. You seem to recognize the dangers of this now. But it seems despite your young age, you are showing this hopelessness that you cannot cure. Defeatism. That, Mr. Morris, is obviously not good.

[46] Ms. Sibblis assesses how anti-Black racism, education, socio-economic factors, mental health, social influences, and criminal justice involvement have affected you. How it has brought you here. Before me. To be sentenced on these serious charges. I will explore this more in my own analysis. However, at this point, let me set out in full Ms. Sibblis's summary:

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.

[47] I wish to talk briefly about the pre-sentence report that was prepared for you. It is sparse. It was not very helpful to me. However, it is worth pointing out that the probation officer's conclusion is not that much different than that of Ms. Sibblis when it comes to your potential and what may have contributed to your offences:

The nature of the current offences illustrate that the subject makes impulsive decisions that put him at risk of further trouble. The writer is aware of the seriousness of the current offences before the Court. It is the writer's opinion that the subject must begin to assess the above noted deficiencies and additionally negative peer affiliation and leisure/recreational activity. The subject should also consider addressing possible trauma and other health issues that he reported may be afflicting him. Given the subject's stated willingness to want to better himself and improve his behavior he may be able to begin living a productive and pro-social lifestyle if he elects to address the above noted deficiencies and overall areas of concern.

C. ANALYSIS

[48] In arriving at a fit sentence, I am keenly aware that the sentencing principles of general deterrence and denunciation are most important for offences such as this. This is so even for first offenders. This is so for young Black men like you. This is so even when I apply the approach that I set out in *Jackson*.

[49] We have a serious problem with gun crime. Reducing gun crime and its associated violence, is a long game. Effective solutions take time, money, and commitment. There is no one single solution in the short term. Many have recognized that tackling gun crime means getting at the roots. Investing in at-risk communities, addressing social and economic inequalities and disadvantage, supporting smart and fair policing with adequate resources, dismantling gangs and getting at the reasons why young people join them, stripping the obscene profits of illegal activities like the drug trade, and effectively treating societal ills such as addiction and mental illness. The list goes on and on. The problems are complex. And the answers are not easy.

[50] But the criminal justice system plays an important role. Not only to deter gun crime with fit sentences, but to make sure the criminal justice system commands the respect of the people who look to it for solutions.

[51] It seems like not a day goes by without the media reporting yet another gun tragedy. Sometimes very horrible ones. It happens in every neighborhood. It happens in my own. None are immune from gun violence. People are rightfully outraged and bewildered by it. They feel powerless in its onslaught. Afraid. It brings up some strong and very basic emotions in all of us. This gun violence has been with us for some time. I am afraid it will be with us for a while. The tide of fear in our communities rises and falls with the tragedies that come with gun violence. But when the tide of fear is high, we “feel” very strongly about gun crime. Because guns kill. Innocent victims die. Families are torn apart. Neighborhoods are gripped with pervasive insecurity. That grim reality pushes us to a one dimensional view of gun crime and those who commit them. It pushes judges to impose longer and longer sentences.

[52] My role is to give expression to that fear. To condemn the crime and those who do it. But it is not my role to give in to that fear. No matter how strongly it seizes the community’s psyche. Reason must control emotion in sentencing. Because in our system, a sentence is not just about the crime. It must be also about the offender. It must be about the particular facts of the case. A sentence must be multi-dimensional. It must be proportionate.

[53] As well, we have a problem with the disproportionate imprisonment of African-Canadians. This too is a serious problem. Sometimes the solutions to these two problems may seem to clash with each other. Gun crime calling for stiffer punishment. Longer jail sentences. The other problem calling for more moderation. More restraint. More creative solutions when creative solutions are right.

[54] To balance these competing pressures and to arrive at a just sentence is not always easy. But in my belief, it would be wrong to only give consideration to general deterrence and denunciation; to sentence every offender to a significant penitentiary term no matter the circumstances. The law does not require that. I will not do so in your case, Mr. Morris.

[55] Before I get to the specifics of your case, I want to say a few words about some interplay between the sentencing principles of general deterrence and denunciation and the analysis presented in *Jackson* and, indeed, in the *Gladue* framework to sentencing. This is a bit legalistic. It may hold little interest to you. But in my opinion, it is worth saying. The question of how we can reconcile these principles in *Jackson* and *Gladue* with the requirements of sentencing serious crime has always troubled me. It has troubled others too. It is recognized that for some crimes, mitigating factors regarding the offender’s responsibility is outweighed by the needs of general deterrence and denunciation. Put another way, any diminished moral blameworthiness that may exist in a case, is overborne by the need to send a message to others either to deter or to condemn the crime. This is particularly so for serious offences such as gun offences.

[56] However, when looked at in a principled manner, broader systemic factors such as racism and the effects of colonialism must surely have some impact upon the application of general deterrence and denunciation. It can impact upon on how we characterize the seriousness of the offence. Recognizing, as the law must, that individuals are held responsible for the acts they commit that breach the criminal law, the reality is that this choice to act may be constrained by an offender's life circumstances. This can include the limited choices available to the offender due to discrimination or racism. The effects may be subtle but significant. They may be significantly influenced by history. They can become hardwired into our institutional practices. Over the lifetime of the offender, negative influences such as poverty, addiction, mental illness, neglect and abuse in childhood, disrupted family and social 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.

[57] I am not saying something new. These factors have been recognized in the law as being potentially relevant when assessing the moral blameworthiness of the offender. But in addition to this, they may have an effect upon the assessment of achieving the right balance between the needs of general deterrence and denunciation and other objectives of sentencing.

[58] Thus, I pose the question, is it right that we harshly deter and denounce the conduct of people who have been subject to such injustices by giving them stiffer sentences? Is it right to denounce their conduct when that conduct was constrained in choice; a constraint that was inequitably imposed upon them?

[59] I recognize that criminal judges have limited tools available to them to meet the objectives of sentencing. But the law does not say that systemic and background factors should play no role in the assessment of the seriousness of the crime and the weight to be given to general deterrence and denunciation. It is true that in some cases those factors may ultimately play only a little role in the sentence. But at other times, they should allow sentencing judges to view the concepts of general deterrence and denunciation with more subtlety and nuance. If viewed through a larger systemic lens, the needs of general deterrence and denunciation may be met with sentences of greater restraint.

[60] This subtlety and nuance may include analyzing these concepts with consideration of how they may play out in these communities. Sentences other than large periods of incarceration may not lose their deterrent or denunciatory effect given the nature of the community from which the offender comes. Long periods of incarceration may also fail to achieve those objectives in a meaningful way in certain communities. This is yet another layer of complexity that must be taken into account depending upon the circumstances. Thus, in the right case, a more creative sentence, shaped to the individual life experience of the particular offender, may still deter and denounce.

[61] All this leads me to say that the systemic information provided in your case, Mr. Morris, is important. It is relevant not only in terms of assessing the moral blameworthiness of your actions, but it may be useful with assisting with the characterization of how serious your crimes are and in the application of the principles of general deterrence and denunciation to your sentence.

[62] I believe that the law supports this perspective. Although the principles of general deterrence and denunciation continue to be recognized as the primary sentencing principles for serious offences, there is also an understanding that the principles of restraint, rehabilitation, and individual deterrence cannot be ignored exclusively in favor of general deterrence and denunciation. In addition, the objectives of denunciation and deterrence are not only met through the imposition of a long term period of incarceration but can take other forms. Finally, the effectiveness of incarceration as a deterrent itself has been questioned by the Supreme Court of Canada in cases such as *R. v. Nur*, 2015 SCC 15; [2015] 1 SCR 773 and *R. v. Proulx*, 2000 SCC 5; [2000] 1 SCR 61.

[63] Having said this, let me now deal with your sentence Mr. Morris. As the Crown submits, there are aggravating factors to the offences. You had a 38 caliber revolver with five rounds in it. This is a dangerous handgun. You also had this on your person concealed in your jacket in public.

[64] I do want to do a more detailed analysis on a point that was argued by the Crown to be aggravating: your flight from the police when you were stopped initially with a group of young men. That flight continued over a fence and into the parking lot of a mall. You threw away the gun. There are cases that have treated these sorts of facts as an aggravating factor. I do not disagree with those cases *per se*. But in this case I have been given much more information that puts this behavior into context.

[65] First are the systemic issues that have led to distrust between the police and Black men. These are set out in the reports. This has caused many Black men to fear their interactions with the police. In this case, there is specific information about your own past experience with the police and how you view them. You did not feel you would be fairly treated by them. I have little doubt that this all contributed to your impulsive reaction to take flight. It was not a considered action, but a reflexive one given the situation existing at the time. This fear was aggravated by the fact you collided with a police car as you ran. It also likely contributed to your ditching of the gun. I note that the gun was not thrown away into a place that was easily accessible to a passersby or innocents. It was left in an unused stairwell, concealed in a jacket, amidst a pile of debris and water.

[66] Giving your acts a contextual analysis in light of the wealth of evidence provided to me on this sentencing, I do not find this to be a weighty aggravating factor in your case. I appreciate that accused people should not flee from police. Especially carrying a loaded firearm. But it is understandable to me that you ran. It was not a coldly calculated act to escape but one based upon emotion and a state of mind that has been shaped both generally and specifically by the

historical racism suffered by Blacks and by you. In other words, not every flight from the police should be treated the same. Here there is a connection in the evidence between your act of flight and the systemic factors. I find it would be wrong to punish you more severely for this. When I view how anti-Black racism and historical injustices have contributed to your actions, the needs of general deterrence and denunciation normally raised by this act of flight is tempered. Given that the choice you made to do so was affected by these factors, the moral blameworthiness of your actions is also lessened.

[67] In addition, in assessing the seriousness of the offences, when I look at potential aggravating factors that often exist in the case law, here, there is no evidence that your possession of the gun is connected with other crimes such as crimes of violence or drug trafficking.

[68] There are also some very traditional mitigating factors. You are a first offender. You were young when you committed these crimes. You were 22 years old. You have supportive family and friends. There is a side of you that speaks well to your rehabilitation. I have mentioned them before. Your warmth, kindness, and respectfulness.

[69] The Crown argued that you have no remorse. You did not plead guilty. The law is strict that I must not sentence you more harshly because of this. You have the right to a trial. But the law also recognizes that a guilty plea is a sign of remorse. In most, but not all cases, a guilty plea- being a sign of remorse and acknowledgment of responsibility- means that the prospects of rehabilitation is better, and that the offender's danger to society in the future is likely less. I say some but not all cases because sometimes a guilty plea has less weight when the Crown's case is overwhelming.

[70] I have been a judge long enough to know that having a trial does not always mean an offender has no remorse or does not take responsibility. On the other hand, I also know very well that for some offenders, a show of remorse just before sentencing is not real; it can be a "show" to avoid harsher punishment.

[71] I have taken all this into account. In your case Mr. Morris, I fully appreciate the substance of your testimony is that you denied possessing the gun. The jury did not believe you. Even in the application for a stay, I did not find you fully credible.

[72] However, Ms. Sibblis noted that you have regret about the choices you have made. You feel bad about the pain it has caused your mother. I also noted your testimony before me. There was a moment on the stay application when you could not carry on testifying. We had to take a break. I believe you were overwhelmed in that moment. I could see that. From everything that I know about you, from your conduct at trial and from the information given to me at this sentencing, you are far from a hardened criminal. All of this is felt very deeply by you. I believe that you have real regret for your actions. It is not regret about getting caught or being punished. It is remorse for choosing the path that you did.

[73] I must take all the aggravating and mitigating factors into account and find a proportionate sentence. A fit one. One that will deter and denounce these serious crimes, but that will also give due respect to all the evidence presented at this hearing.

[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 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.

[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.

[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:

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.

[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. Deterring others who might be in a similar situation as you are can be done by something different than a penitentiary jail sentence.

[79] This brings me to my sentence. I find that in this case a sentence of 15 months is the fit and proportionate sentence. This sentence will deter and denounce. It should not be forgotten that I am imposing a jail sentence on a young first offender. While not the longest given for this kind of case, it still is a significant reformatory sentence. Given the particular circumstances of your case, I find that the sentence will deter others. It will send a message that illegal gun possession will not be accepted. But it will also show those who are aware of the facts of your case that those important sentencing objectives can be reached without an undue heavy hand, but rather by punishment that is measured. Not handed out blindly or excessively. Based only upon fear. But one that can begin to address, one small step at a time, the problem of the disproportionate incarceration of Black offenders.

[80] I wish to make one thing clear. I am very well aware of the cases that point towards sentences of 3 years and higher for gun offences that are on the criminal end of the spectrum, regardless of mitigating factors that might exist. But I also know that sentencing ranges are guidelines. Although an important tool, it is but one that should guide me in my task.

[81] To support my decision, I will list a number of cases given to me by your lawyers. They deal with similar offences. Usually it is not very helpful to simply list the names of cases. Each case is unique. But I do so to counter any criticism that anything less than a penitentiary sentence is wrong. It is not wrong in every case. It very much depends on the facts of the case. Sentencing must always be an individual process. In these cases judges gave sentences of 1 year, 15 months, 18 months, just under 2 years. Some of these sentences were permitted to be served in the community rather than in jail. The cases are: *R. v. Ishmael*, 2014 ONCJ 136; *R. v. Garton*,

2018 ONSC 544; *R. v. Rutledge*, 2015 ONSC 6625; *R. v. Shunmuganathan*, 2016 ONCJ 519; *R. v. Nuttley*, 2013 ONCJ 727; *R. v. Kelsy*, [2018] O.J. No. 3879; *R. v. Cadienhead*, [2015] O.J. No. 3125; *R. v. Williams*, [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.).

[82] Now I want to talk about that elephant in the room. I know you are in custody on other charges. What those charges are were not explained to me by either the Crown or your lawyers. However, I do know from some of the materials filed what the charges are said to be. Of course, there is a charge of breaching your bail. There are also some other offences. But they are not gun offences. Your surety surrendered your bail so you are in custody on the charges I am sentencing you for. To someone hearing this, I am sure they will say you have not behaved well while on bail. They may be right. But you are presumed innocent of these alleged new offences. I am sentencing you as a first offender. Someone without a criminal record. The new charges do not change that. The presumption of innocence is the foundation of our criminal justice system. While it may be hard for many to understand, I cannot let that foundation be eroded or chipped away by taking into account the new charges.

[83] But let me be real for a moment. The new charges does mean that there are grounds to believe that your time while on bail on these charges have not gone smoothly. Some may question why I am giving you leniency. For a 15-month sentence is a lenient sentence. Some may argue that you are not worthy. That you have failings. That you have not yet shown to have turned your life around.

[84] In my opinion, we have to get past this idea of waiting for the perfect person to be lenient. Waiting for the most benevolent soul by the standards of the privileged and the few, before we decide to extend consideration for leniency. For we may be waiting a long time. The young man who makes the choice to pick up a loaded illegal handgun will not likely be a product of a private school upbringing who has the security of falling back upon upper middle class family resources. Rather, he is likely to be a product of oppression, despair, and disadvantage. Likely he is someone who cannot turn his life around on a dime even if he wanted to. In short, he is you, Mr. Morris.

[85] So in the final analysis, what makes this sentencing different from other cases where leniency was not given is that I have been given a wealth of information to sentence you. Information that can be used to take further steps to deal with the over-incarceration of Black people in this country.

D. THE CHARTER VIOLATIONS

[86] I will now turn my attention to another element of your case that is relevant to your sentencing. Before your trial began, I heard an application from your lawyers to stay the charges against you based on violations of your *Charter* rights that happened during your detention and arrest. I did not stay the charges. But I did find violations of your *Charter* rights. I found that your right not to be deprived of your security of the person except in accordance with the

principles of fundamental justice was violated when D.C. Moorcroft struck you with his police car, and that your right to counsel was violated when P.C. Keeler continued to question you after you had asked to speak to a lawyer. The reasons for my decision is fully explained in my ruling *R. v. Morris*, [2017] O.J. No. 3882; 2017 ONSC 4298. In those reasons I found that a sentence reduction would be a good remedy for these violations.

[87] The Crown argued that these *Charter* violations are minor and no reduction should be given. Your lawyer argued that you should get a reduction. When I asked her how much of a reduction she was asking for, she said thirty days. It appeared to me at the time that this was an arbitrary number that she had come up with on the spot. As I will explain, I find you should get mitigation. Indeed, as you know, I found mitigation should be higher than what your lawyer asked for.

[88] It is true that I said in my decision that the violations were “relatively minor”. However, that was in the context of a stay being asked for. The test for a stay is very high. It is not given very often. So when I said it was relatively minor, I was saying that it was not serious enough to stay the charges against you. However, I clearly stated that I felt they were serious enough to reduce your sentence.

[89] Dealing with the violation of the right to counsel, I found that P.C. Keefer did not ask many questions. I also found that your answers were not like confessions or anything of that sort. However, couple of the questions were intended to get evidence that could support the prosecution. Otherwise, there was no reason for P.C. Keefer to ask why you had run or how you had lost your shoe. There was no other reason why the officer carefully noted down the questions and answers. While the evidence he actually got was not of much importance, P.C. Keefer should not have asked those questions. This is not new law. This is law that has been around a great while. Every police officer is expected to know it. I am sure P.C. Keefer did. When a detained person asks to speak to a lawyer after being given his right to counsel and before he gets a reasonable chance to do so, except for some exceptional case, questioning must stop. The right to counsel is a very important right under our *Charter*. So while I appreciate this is not the most serious violation given the limited questioning and the answers obtained, it is not a trivial breach. It was also not done in good faith as the law defines that term. P.C. Keefer should have known better.

[90] The more serious of the two violations was what D.C. Moorcroft did. Mr. Morris, you ran from the police through the parking lot when they first came upon you. To that extent you played a part in the injury you suffered when you were struck by D.C. Moorcroft’s car. But while I did find that he was not trying to deliberately run you down, I also found that you did not simply run into his car as D.C. Moorcroft claimed. D.C. Moorcroft was trying to cut you off at the pass. He was driving carelessly. He made a deliberate choice to drive the way he did. He may not have wanted to hit you with his car, but he wanted to stop you from running. He saw you as he drove his car. It is not as if you suddenly appeared out of nowhere. I found his actions were aggressive. The way he was driving, it was foreseeable that something dangerous could happen. You were on foot and vulnerable to that car.

[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 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.

[96] I appreciate that I must not mitigate your sentence to the point where it becomes disproportionate to the gravity of the offence or your moral blameworthiness. I do not believe I have. A mitigation in the amount of 3 months is in keeping with the facts of the violations, the sentencing principles, and the case law that has given me the discretion to do this. It is also proportionate to the gravity of your offence and your own moral blameworthiness.

E. CONCLUSION

[97] After mitigation for the *Charter* violations, I have sentenced you to a jail sentence of 12 months. You have done a lot of dead time. The sentence will be based upon the credit you will receive for that dead time. I will credit you 1.5 to 1 for that pre-trial custody. The evidence shows that you received no real programming, had a difficult time in jail, and at times

experienced physical discomfort in jail due to your medical conditions. You also did not receive consideration for parole or remission while in pre-trial custody. I find it right to give this enhanced credit. Therefore, 243 days of pre-trial custody will be used up. You will be sentenced to a further 1 day in jail on each charge concurrently. I also made a DNA order, s. 109 weapons prohibition, and the forfeiture order.

[98] I placed you on probation for 18 months. The counseling and programming you are to follow while on this probation included the culturally appropriate ones recommended by Ms. Sibblis. I attached these programs and organizations as a schedule to your probation order. These are designed to assist you in your rehabilitation and to address the issues that got you to this place in your life.

[99] Let me end by repeating the final words I said to you in court:

Mr. Morris, I don't know what the future's going to hold for you, immediate or long term future. Immediate future, I fear you're most likely to return to your cell in Maplehurst and your immediate surroundings may not change very much, in your eyes. At least may not for awhile. But, you will get released at some point. But, what I hope my decision does give you, Mr. Morris is hope. That's something I don't think you have had a lot of in your past. And certainly not a lot in your current situation.

Life is a struggle. You can take a look at your mom's life. What she's accomplished despite those struggles. And it is more of a struggle for some than for others. You know. Let's be frank. You know. You've struggled more than others that you've known. So has your family.

But hope can be a very powerful thing, Mr. Morris. It can be kind of like an anchor when all of that struggle that you're suffering from in life is buffeting you around.

.....

So I do hope the future brings better things for you, Mr. Morris. And we, judges, can take chances on people sometimes. Within the limits of the law. And I'm taking a chance on you. Because I do believe that you are a better and stronger person than the facts of these offences show you to be. So, I hope you are strong enough to resist those forces that will bring you potentially back into jail when you are released. All right, Mr. Morris, thank you.



Justice S. Nakatsuru

Released: September 11, 2018

Appendix A

Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario

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1. Introduction

We have been asked by counsel for Mr. Morris to provide evidence and analysis of research relating to the existence and impact of Anti-Black racism in Canadian society generally and in the Toronto region in particular. The aim of this report is to assist the Court with understanding the conditions under which many Black people reside, receive education and employment, experience crime and the criminal justice system, and suffer from various forms of discrimination. When read in combination with Ms. Sibblis' analysis of Mr. Morris' life experiences, this report may also assist the Court in gaining a nuanced understanding of the social conditions and context that may have contributed to his involvement in the offence for which he is being sentenced. We have been apprised by counsel for Mr. Morris, Gail D. Smith, of the underlying facts related to Mr. Morris' finding of guilt. We have considered these facts in order to focus our contextual and social analysis.

2. Our Analysis in Brief

The over-representation of young Black men in the criminal justice system is increasingly acknowledged by scholars and policy-makers alike as an important social issue. Over the past several decades in Ontario, various task forces and commissions have drawn attention to the social factors known to increase involvement in crime and have identified evidence of systemic discrimination in key social institutions – from child welfare and education – to the operation of the justice system itself.

The present circumstances of Black Canadians have deep historical roots. The institution of slavery and of legalized segregation in Canada formed the basis for Black Canadians' initial relationship with the state and its people. While slavery and segregation served to underpin early economic and political structures, the ideas and assumptions on which they were based shaped the nature of social relations. As evidenced by public opinion polls, some of these beliefs and ideas are still present in the minds of Canadians – particularly those associating Black people with crime and violence. Indeed, racially prejudicial attitudes remain commonplace among Canadians. The continued existence of various forms of institutional racism that affect the lives of Black Canadians is also underscored by the anti-racism initiatives recently launched by the City of Toronto and the Government of Ontario.

For this reason, understanding – and redressing – criminal justice decisions lies in the social context where young Black men suffer racism, discrimination, and marginalization. It is impossible to understand the offending behaviour of young Black Canadians and their overrepresentation in the criminal justice system, without a broader consideration of the Black experience in Canada, past and present.

3. Anti-Black Racism in Ontario

HISTORICAL RECORD:

Colonialism and slavery structured Black Canadians initial relationships with the state and its institutions. This legacy continues to impact upon the lives of Black people in Canada, Ontario and Toronto.

People of African descent have a long history in Canada and have played an integral part in the formation of the nation. The first documented person of African descent in Canada, Mathieu Da Costa, served as a translator to French and Dutch explorers as early as 1609 (Winks, 1997). Black people were subsequently brought to Canada as slaves in a practice that lasted from the early 17th century until it was abolished in 1834 (Ibid). Many Blacks also arrived in Canada, and particularly Ontario, through the Underground Railroad, as fugitive slaves from the United States (Maynard, 2017). Most of Ontario's Black settlements were located in the Southern parts of the

province in and around the Windsor, Chatham, London, St. Catherines and Hamilton areas. Others formed small groupings in Toronto and outside of Barrie, Owen Sound and Guelph. These closely concentrated Black communities served as a buffer against prejudice and discrimination from the White population. The historical record suggests that Black people in Canada were generally treated with hostility and disdain.

The fact that at least six of the first sixteen legislators of Upper Canada held slaves, provides insight into how early Canadian settlers viewed the Black population. As the institution of chattel slavery was predicated on the idea that the slaves were not human beings, it is reasonable to suggest that the initial experience of Black people in Canada was one of second class citizenship. Indeed, after slavery was abolished, Blacks experienced segregation (both legal and de facto) in education, employment, housing and other spheres of social life (Henry and Tator, 2005)¹. These early experiences served to put Canada's Black population at a severe economic and political disadvantage, while simultaneously privileging White Canadians (Wortley and Owusu-Bempah, 2011). This history has also set the stage for the experience of more recent Black immigrants by creating a framework of anti-Black racism that continues to express itself across the various facets of Canadian society.

Canada, like many other Western nations, continues to carry the heavy burden imposed by a legacy of colonialism. As Morgan (2016) notes, a key feature of the experience of Black Canadians has been the simultaneous erasure of the contributions that Black people have made to this country along with the discrimination they have faced while making these contributions. The participation of Black Canadians in military service, politics, educational reform, and entrepreneurship goes largely unmentioned in the media and is almost completely omitted from school curricula. At the same time, the full extent of the discrimination experienced by Black people – from slavery and segregation to the interpersonal violence experienced by the victims of hate crimes today – remains under-reported (Henry & Tator, 2005; Maynard, 2017). Morgan (2016) is correct in emphasizing that the erasure of Black accomplishments alongside the failure to acknowledge Canada's colonial legacy contributes greatly to the perpetuation of anti-Black racism. Without a clear historical contextualization of Black disadvantage, the under-achievement of Black students, Blacks' over-representation among the unemployed, and their increased presence within correctional facilities is easily explained by reference to stereotypical assumptions about Black work ethic, the nature of Black families, and Blacks' supposed innate propensity for crime and violence (James, forthcoming; Owusu-Bempah, 2017).

¹ It should also be acknowledged that this reality is a feature of the distant past; the legislation that allowed for segregated schools in Ontario remained on the books until 1964 (Henry & Tator, 2005).

Nonetheless, the continued presence of various forms of racism² and discrimination in Canadian society has both been extensively documented by scholars and acknowledged by government commissions and task forces dating back several decades. In Ontario, clear evidence of government concern about anti-Black racism dates back to the 1980s and is evidenced most recently with the formation a provincial Anti-Racism Directorate in 2016, which has anti-Black racism as one of its main foci. Likewise the 2016 Toronto Action Plan to Confront Anti-Black Racism provides evidence of similar concern in the province's largest municipality and home to the greatest number of Black Canadians. The recent establishment of these anti-racism initiatives in Ontario reinforces the fact that Black people in Canada, regardless of place of birth, or length of time in the country, continue to face unique challenges that influence their experiences and life chances. The following is a summary list of Ontario government anti-racism initiatives:

- [*Provincial Advisory Committee on Race and Ethnocultural Relations*](#) (1987)
- [*Anti-Racism Secretariat*](#) (1992)
- [*Stephen Lewis Report on Race Relations in Ontario*](#) (1992)
- [*Amendments to the Education Act*](#) (1992)
- [*Commission on Systemic Racism in the Ontario Criminal Justice System*](#) (1995)
- [*The Review of the Roots of Youth Violence*](#) (2008)
- [*Ontario's Equity and Inclusive Education Strategy*](#) (2009)
- [*Accepting Schools Act*](#) (2012)
- [*Anti-Racism Directorate*](#) (2016)
- [*Toronto Action Plan to Confront Anti-Black Racism*](#) (2016)

The myriad initiatives, accompanying reports and lengthy lists of recommendations mean little, however, if they have limited influence on the actions of key decision makers. To help contextualize the experiences of young Black men in the criminal justice system, and to outline the facts that inform our opinion, we outline the nature and extent of the discrimination, marginalization and exclusion which they experience across various institutions and areas of social life in Ontario today. We begin by looking at what it feels like to be a young Black man in this context.

4. Black Masculinities

RESEARCHERS HAVE FOUND:

Youth subcultures tend to reinforce masculine characteristics associated with violence,

² For example, the results of a 2007 public opinion poll showed 47% of Canadian respondents (outside of Quebec) reported being at least slightly racist. The figure for respondents in Quebec was 59% (Leger, 2007 cited in Patriquin, 2007).

dominance, and homophobia. These traits or characteristics may be overemphasized by Black males for whom acceptable means of displaying masculinity are blocked, and for whom experiencing racism is a daily reality.

It is generally accepted that Canadian society is built on the values of liberal individualism – namely, that individuals act out of their own free will and that their success or failure is because of the choices they have made or the risks they have taken. In this context, whatever is achieved is portrayed as more related to an individual’s own efforts than to the social, economic or political context in which they exist as racialized, marginalized or minoritized individuals. Boys and men who fail to meet these expectations are said to perform “subordinate” forms of masculinity. Indeed, scholars submit that there is a link between social marginalization and boys’ and men’s violent behavior (Groes-Green, 2009; Messerschmidt, 2000).

According to Messerschmidt (2000), in addition to competitive individualism and aggressiveness, men generally perceive violence as an appropriate reference for constructing their masculinity and as a means of mediating their relationships with other people. To them, violence – which over time becomes normalized – is thought of as a “masculine resource” that serves in their affirmation and shields their vulnerabilities. In some cases and in some contexts, men’s orientation to aggression and violence as forms of their masculinity are connected to their responsibilities to provide for (i.e. being “bread-winner”) and “protect” their families (see Groes-Green, 2009; Hope, 2010). Connell and Messerschmidt (2005) also write of “protest masculinity” which they define as “a pattern of masculinity constructed in local working-class settings, sometimes among ethnically marginalized men, which embodies the claim to power typical of regional hegemonic masculinities in Western countries, but which lacks the economic resources and institutional authority that underpins the regional and global patterns” (pp. 847–848).

As Connell (2005) points out, youth subcultures also tend to reinforce masculine characteristics associated with violence, dominance, and homophobia. These traits or characteristics may be overemphasized by Black males for whom acceptable or positive means of displaying masculinity are blocked, and for whom experiencing racism is a daily reality (Goff et al., 2012). Whereas many White men are afforded the opportunity to affirm their masculinity by socially acceptable means, a decent-paying job in the legitimate labour market, for example, these avenues are blocked for many Black men, particularly those living on the margins of our society. As Majors and Billson (1992) suggest:

Toughness, violence, and disregard for death and danger become the hallmark of survival in a world that does not respond to reasonable efforts to belong and achieve [to be a good man]. The frustration that inevitably wells up from believing in a role that one cannot fulfill effectively spills over into other ways of proving masculinity: being cool, being tough, and sinking deeper and deeper into

the masking behaviors that remove the sting of failure (Majors & Billson, 1992: 34).

Available data indicate that serious violence is concentrated within Toronto's Black communities. Gartner and Thompson (2004: 33), for example show that between 1992 and 2003, the homicide rate for Black Torontonians (10.1 murders per 100,000) was more than four times greater than the city average (2.4 murders per 100,000). Further analysis demonstrates that young Black men are particularly vulnerable. Indeed, whereas Black males account for only 4 percent of Toronto's population, in 2007, they represented nearly 40% of the Toronto's homicide victims. Thus, Black males had a homicide victimization rate of approximately 28.2 per 100,000, compared to only 2.4 per 100,000 Toronto's population as a whole (Wortley 2008 in Owusu-Bempah and Wortley, 2014: 294). Likewise, survey data demonstrate that Black youth in Toronto report higher levels of violent offending and violent victimization than youth from other racial groups. For example, 53% of Black students who participated in the 2000 Toronto Youth Crime and Victimization Survey indicated that they had been involved in three or more fights in their lifetime, compared to 39% of white students, 32% of Asian, and 28% of South Asian students (Tanner and Wortley, 2002 in Owusu-Bempah and Wortley, 2014: 296).³

The centrality of danger and violence in securing masculinity among Black urban poor men is captured well in the work of Anderson (1999). Anderson suggests that exerting violence and aggression, or at least exhibiting the potential for violence and aggression, is key to gaining respect within structurally disadvantaged communities. Violence may also be seen as an accepted method of dispute resolution for individuals who subscribe to "street" oriented subcultural norms, and view the police and criminal justice system as an oppressive institution, unable or unwilling to serve as a meaningful resource. Both the marginalization of Black men, and the criminalization that results from it, influence how they come to view themselves, and as a result, how they navigate the world in light of the opportunities (or lack thereof) afforded to them.

In the case of Black youth, numerous scholars have written on how schooling and other social institutions fail to provide them with the support and education needed for success and effective participation in society (Dei & Kempf 2013; James 2012a; 2009; Teclé & James 2014). A web of negative stereotypes, which operate to disadvantage Black children, are sustained by the very

³ It is important to note, however, that Black youth are not over-represented in all types of criminal offending. Data gleaned from the same survey show that White students report much more involvement with illicit drugs than Black youth. Indeed, 45% of White students reported that they had used cannabis at some time in their life (compared with 39% of Black students), 6% had used cocaine or crack (compared to only 2% of Black students), and 13% had used other illegal drugs (compared to only 3% of black students). Likewise, 17% of White students indicated that they had sold illicit drugs at some time in their life, compared to only 15% of Black students (Tanner and Wortley, 2002 in Owusu-Bempah and Wortley, 2014: 294). These findings are notable because Black people are generally over-represented in arrests and convictions for drug possession and trafficking.

institutions whose purpose is to foster healthy development from childhood into adulthood – and all in the context of a “liberal” society which celebrates individual merit and achievement. We look at those institutions in the next two sections, starting with child welfare followed by education.

5. The Experiences of Black Children and Youth within the Child Welfare System

KEY FACTS:

- Black Canadians comprise 8.5% of the population of Toronto; their young represent 40.8% of children in care.
- Children in care are more likely to come into contact with the youth justice system than they are to graduate from high school.

Racism and poverty have been credited with fuelling the disproportionate representation of Black Canadian children in Ontario’s welfare system (Fallon et al., 2015). Although Black Canadians comprise only 8.5% of the population of Toronto, their young represent 40.8% of children in care, according to data released by the Children’s Aid Society of Toronto (OACAS, 2016: 4).

Concerns about Black Canadians’ experiences with Ontario’s child welfare system have been raised by service users, advocates, and community partners and the media for decades (OACAS, 2016; OHRC, 2018). These concerns revolve around increased levels of surveillance that target Black families and result from widely-held, yet often unconscious, beliefs that Black families are unfit and pathological (Maynard, 2017). Not only are Black children and youth over-represented within the welfare system in Ontario, but service users report that they are treated differently with comparison to White children and youth, experiencing more negative outcomes and less access to required services.

The social circumstances of Black Canadians play a key role in influencing their experiences within this system. King et al. (2017) analyzed data from Ontario’s child welfare agencies, finding that Black children were more likely to be investigated than White children, though he found little evidence to suggest that differences in substantiating cases, in transferring families to ongoing services, or in placing children in out-of-home care were based on race alone. However, he reported that severe economic hardship, combined with assessments about the quality of the parent-child relationship, contributed substantially to the decision to put the child in care.

As in the case with Indigenous peoples, it could be argued that assessments about parent-child relationships are based on White-middle class norms about family and parenting that are culturally biased against Black families. The practice of extended families caring for children, something common outside of the Western world, for example, may clash with Western notions of the nuclear family and ideas about who should have primary responsibility for raising children. These differences are compounded by the economic hardships facing many Black

people in Toronto which result in parents working long hours to support their families, while children are left in the care of grandparents, aunts, uncles and siblings.

Given concern about Black over-representation in the child welfare system, the Children's Aid Society of Toronto recently held a series of community consultations with the city's Black communities. Participants included parents who had involvement with the organization, adults who were in care as children, social service staff, and members of organizations that partner with child welfare agencies (CAS Toronto, 2015). A resounding theme of these consultations was the high degree of fear and mistrust of the system. Parents and caregivers said that they were not being 'listened' to by service providers and that children in care were not being heard. While participants acknowledged the need for child protection services to keep children safe from abuse, they also stressed the need for improved transparency and a greater range of service options for Black families. Significantly, there was a widespread perception of collusion between the major institutional systems that support Black children – namely, child welfare, education, and criminal justice.

The over-representation of African Canadian children and youth within the child welfare system in Ontario and their experiences of discrimination within this system present a number of areas of concern. The removal of Black children from their parents disrupts Black families, thus weakening the ties of kinship that are important for the emotional and social development of children and youth (Owusu-Bempah and Howitt, 1997). As contact with the child welfare system is a predictor of later offending, disproportionate levels of contact with the system, combined with the absence of culturally appropriate practices, increases the criminogenic effect of care for African Canadians (Jonson-Reid and Barth, 2000; Owusu-Bempah, 2007; 2010). Furthermore, the high rates of contact with the system and the removal of Black children from their parents also reinforces negative stereotypes about the fragility of Black families and further pathologizes African Canadian communities.

In sum, experience with the child welfare system acts as a catalyst for criminal offending and is a burden disproportionately inflicted upon Black Torontonians. Their increased exposure to one state institution, child welfare, increases their chance of exposure to another, the criminal justice system. The failure of Ontario's education system to adequately address the needs of Black students also plays a role in their increased criminalization. We turn to this important institution below.

6. The Experiences of Black Children and Youth in Education

KEY FACTS (based on 2006 –2011 data from the Toronto District School Board):

- Almost half of the Black student population is streamed into non-university tract programs.

- Black students are more than twice as likely to be suspended and almost twice as likely to be expelled compared with White students and students from other racialized groups.
- Black students are twice as likely to drop out of school in comparison to White students and students from other racialized groups.
- Black students graduate below the provincial graduation rate.

The relationship between educational failure and criminalization is well-established (Groot & van den Brink, 2010; Lochner & Moretti, 2004). Poor academic performance, absence from school, and failure to graduate all increase the likelihood of offending.

As is the case with child welfare, concern about Black academic (under) achievement has been present in Ontario for several decades. In 1987, a Provincial Advisory Committee on Race and Ethnocultural Relations was formed following a provincial conference on race and ethnocultural relations. The Committee prepared a Working Paper in 1988 entitled “The Development of a Policy on Race and Ethnocultural Equity” (Ministry of Education, 1988). Shortly thereafter, in the wake of the “Yonge Street Riot,” NDP Premier Bob Rae commissioned Stephen Lewis to investigate the state of race relations in Ontario.

The 1992 Stephen Lewis Report, as it has come to be known, highlighted a lack of progress being made to improve educational outcomes for Black students. Lewis outlined the concerns of Black students drawn from consultations held in Toronto and the surrounding areas. These concerns included: a lack of racial diversity among teachers; an absence of Black people and Black history in the curriculum; the tolerance of racist incidents in schools; the harsher discipline of Black students; the streaming of Black students into courses below their ability; and Black students being discouraged from attending university. Similar findings by several other government-sponsored initiatives led to the NDP’s amendments to the Education Act in 1992. These amendments called on school boards to develop and implement anti-racism and ethnocultural equity policies that would promote the identification and elimination of systemic inequities and barriers to equitable education for students and encourage equitable education practices for all staff (James & Turner, 2017).

The positive sentiment derived from these suggestions was short lived, however, following the election of conservative Premier Mike Harris in 1995. Harris campaigned on an anti-employment equity platform and a promise of increased discipline in schools. In 2000, a Code of Conduct for Ontario schools was released, followed soon after by the amendments to the Education Act, granting legal force to the Code of Conduct giving principals and teachers more authority to suspend and expel students. The Act made expulsions and suspensions mandatory for serious infractions and set out a zero tolerance policy for inappropriate behaviour. This approach to school discipline was criticized for suspending students for minor incidents and for being especially harsh on Black students (Puxley, 2007). In 2007, the OHRC and the Ministry of Education finalized a settlement to end the provincial zero tolerance policy and replace it with a progressive discipline approach to dealing with inappropriate school behaviours. Despite

seemingly positive changes to the Education Act, including the implementation of an Equity and Inclusive Education Strategy in 2009, Black students continue to face poor educational prospects.

James and Turner (2017) analyzed data from a 2006–2011 cohort of Black students in the Toronto District School Board (TDSB) to examine their educational outcomes. Given the general youthfulness of the Black population, Black Canadians represent a larger proportion of students in the TDSB’s high school population than they do in the general population. Whereas Black people represent 8.5% of the population of Toronto, they represent 12% of students in the 2006–2011 TDSB cohort documented in the James and Turner report highlighted below.

The streaming of Black students into non-university tract programs in schools has been an ongoing concern for students, parents, educators, community activists and some politicians. This concern centers on the perception that the streaming of Black students into non-university tract programs is the result of stereotypes asserting that Black people are less intelligent, less academically inclined (under-achievers), and thus more suited to vocational or college based programs (James, 2012: 482-484). As James and Turner demonstrate, in comparison to White and other racialized students, Black students in the TDSB are underrepresented in the Academic program of study and over-represented in the Essentials program. In the 2006–2011 cohort, 53% of Black students, 81% of White, and 80% of other racialized students were in the Academic program of study. On the other hand, Black students (39%) were over twice as likely White (16%) students and students from other racialized backgrounds (18%) to be enrolled in the Applied program. Black students were also three times as likely to be enrolled in the Essentials program (9% versus 3% of White and other racialized students) (James and Turner, 2017: 30).

Suspension and expulsion rates are also an important indicator of academic success as they reflect time spent outside of the educational system, thus impacting upon on student’s attachment to their schools, peers, and teachers. Exclusion from school is widely recognized as a driver for wider social exclusion and is highly correlated with unemployment and involvement in crime. As Martin Narey (2001), Director General of HM Prison Service in the U.K. notes: “The 13,000 young people excluded from school each year might as well be given a date by which to join the prison service some time later down the line” (cited in McMurtry & Curling, 2008: 56).

Suspensions and expulsions may be particularly detrimental if they are perceived by students to be unjust, which in the case of Black youth, they often are (Ruck & Wortley, 2002: 190). Indeed, as Black students are often stereotyped as “trouble makers” and often subject to increased surveillance and school disciplinary action that align with this stereotype (James, 2012: 480-482). In the 2006–2011 TDSB cohort, Black students were more than twice as likely as White and other racialized students to have been suspended at least once during the academic year. Upon completion, 42% of all Black students had been suspended at least once, compared with only 18% of White students and 18% of other racialized students. Similar disparities exist with respect to expulsions. The TDSB data show that of the 213 students who were expelled between 2011-2012 and 2015-2016, almost half (48%) were Black (James and Turner, 2017: 36).

Finally, the data indicates that Black students' levels of academic success, measured in terms of graduation rates, is far below that of their peers. Among the 2006–2011 cohort, 84% of White students had graduated from high school at the end of 5 years, compared to 87% of other racialized students. By contrast, only 69% of Black students had graduated from high school over the same five-year period. Likewise, Black students were twice as likely (11%) as White and other racialized students (both 5%) to be returning to high school the following year when they should have graduated and twice as likely to have dropped out (20%) compared to White (11%) and other racialized students (9%) (James & Turner, 2017: 31).

The negative consequences of Anti-Black racism in schooling generally and of zero-tolerance policies in particular, cannot be understated. Indeed, in their report on the Roots of Youth Violence, McMurtry and Curling (2008) argue that such policies have contributed to the school-to-prison pipeline, or the funneling of underachieving and excluded Black students into the criminal justice system. If Black students are not afforded the same opportunities for academic success as many of their peers, their life chances ultimately suffer. Poor educational outcomes for Black students ultimately have a negative impact on their employment prospects and earning potential. These problems not only affect individual Black Canadians, but by extension, also their families and communities.

7. Black Employment and Poverty

KEY FACTS:

- The income gap for visible minorities, including Black Canadians, is growing.
- One-quarter of Black Canadian women live below the poverty line (compared with only 6% for White Canadians).
- Black children are living in poverty at the unprecedented rate of 33% for those of Caribbean heritage, 47% of those from continental Africa (only 18% for White children).

The comparatively low levels of academic achievement, combined with structural and institutional forms of discrimination converge to produce inequalities in Canada's employment sector. Based on the poor educational outcomes for Black students presented in the section above, it is unsurprising that Black youth are particularly vulnerable to unemployment. In Toronto, for example, the unemployment rate in 2014 for Black youth aged 15–24 was 30% compared with 20% of youth from other racial backgrounds (CivicAction, 2014).

High rates of Black unemployment are not a new phenomenon. Evidence suggests that Black job seekers are excluded from the labour market, in part, due to the discriminatory actions of employers. In early 1980s Henry and Ginzberg (1985) conducted a series of studies to examine

the impact of race and foreignness (as indicated by name or accent) on the likelihood of being offered a job. In one study, Black and White actors were sent to interviews assuming the role of the same interviewee (the resumes were the same and the actors played the role of the same fictional job candidate). Ultimately, Henry and Ginzberg determined that Black applicants experienced discrimination in one-quarter of job contacts which could not have happened by chance alone.

More recent research has produced remarkably similar results. Douthwright (2017) created four fictional female job applicants; two White and two Black applicants submitted their resumes to entry-level retail jobs. In line with previous American research, Douthwright found that even the White applicant with a criminal record received more call-backs than the Black applicant with no criminal record (see Pager, 2003). Of the 64 applications submitted by the White applicant with no criminal record, 20 call-backs were received, whereas the White applicant with a criminal record received 12. By comparison, the Black applicant with no criminal record received only seven call-backs and the Black applicant with a criminal record received just one (Douthwright, 2017).

Employment discrimination also affects income levels for Black and other racialized Canadians. In fact, data from the 2016 census shows that the income gap for visible minorities actually increased between 2006 and 2016, with members of visible minority groups earning on average 26% less than non-visible minorities (Monsebraaten, 2017). Hou and Coulombe (2010) analyzed data from the 2006 census to examine the earning gaps between Canadian-born visible minorities and non-visible minorities working similar jobs in Canada's public and private sectors. Their research shows that while income was similar for members of visible minority groups in comparison to Whites working in the public sector, the data from the private sector was significantly different. Visible minority men, and Black women in particular, earn significantly less than comparable Whites (comparable in terms of educational attainment and years of professional experience, for example) working similar jobs in private industry. Hou and Coulombe attribute the income differences to differences of equality of opportunity. Whereas the public sector is subject to employment equity regulations, the private sector faces less pressure to have equitable practices and policies.

Predictably, higher levels of unemployment and lower levels of income increase rates of poverty among Black Canadians. Whereas 6% of White Canadian women live below the poverty line, the figure is 25% for Black women in Canada. As a result, Black children are living in poverty at the alarming rate of 33% for those of Caribbean heritage and 47% of those from continental Africa (UNHR, 2016). The rate for White children is 18%. In Toronto Specially, African Canadians

accounted for 19% of people living in poverty, while comprising just 8.4% of the population (National Council of Welfare, N.D)⁴.

In addition to their individualized experiences with poverty, Black Canadians are also over-represented in Toronto neighbourhoods most afflicted by poverty and other forms of disadvantage.⁵ Compounding the effects of lower household incomes, these neighbourhoods are underserved by public transit and contain a lower concentration of essential services. As a result, Black people in Toronto have poorer access to recreational and community centres, libraries, good schools, community health hubs and hospitals (Hulchanski, 2010). These are the very services that serve to create strong communities and to protect young people from the allures of crime, gang membership and the violence that accompanies it (McMurtry and Curling, 2008: 31). Accordingly, in the absence of important social services and in the presence of increased poverty, crime and victimization remain higher in these communities. For example, rates of shootings and homicides are higher in these neighbourhoods than the city average, and the victims of homicide younger than for Toronto as a whole (Hulchanski, 2010: 23). As noted above, it is young Black men who are most adversely affected by this violence. In response, these neighbourhoods are also subject to a hard-enforcement style of policing aimed at targeting its perpetrators (Owusu-Bempah, 2014).

8. Black Canadians' Perceptions of and Experiences with the Criminal Justice System

KEY FACTS:

- Over 80% of Black Canadians in Toronto feel that police treat Black people worse than White people.
- Half of the Black student population in Toronto report being been stopped and questioned by the police on two or more occasions in the previous two years (compared with 23% of White students).
- Black people are over-represented in police “contact cards” for all areas of Toronto, regardless of neighbourhood crime rate or racial composition.
- Black accused are more likely to be detained before trial than White offenders.
- Incarceration is becoming increasingly concentrated among Black Canadians.

The historical record suggests that Black Canadians have had a long and tenuous history with the criminal justice system. Walker (2010) describes the discrimination faced by Black defendants in Ontario's courts during the 18th and 19th centuries. Similarly, Mosher (1998) documents how

⁴ See Table 10, Visible minority groups, 2006: Percent distribution of persons living in poverty.

⁵ As David Hulchanski (2010) points out in his *Three Cities* report, household income in the neighbourhoods in which Black people are most likely to live has decreased by 20% over the past three decades.

police used public order offenses in the early 20th century as a means of controlling Toronto's Black population. The historical and contemporary treatment of Black people in the justice system is has its genesis in Canada's experience with colonialism and slavery. During this period, Black people were systematically dehumanized and depicted as animalistic, aggressive, violent, and dangerous (Fishman, 2006; Owusu-Bempah, 2017). Following the abolition of slavery, the association of Blackness with violence specifically, and criminality in general, was used as a means as of social control and to justify restrictive immigration practices intended to restrict Black entry into Canada (Maynard, 2017).

Unfortunately, these perceptions have not completely subsided over time. As Roberts (2001: 103) points out, there remains a tendency in Canada to "racialize" crime; that is, to develop associations between criminality and racial or ethnic origin. Indeed, a significant proportion of the Canadian public continues to believe that racialized Canadians are involved in a greater proportion of offending than official criminal justice records suggest (Rankin & Powell, 2008). A survey conducted in Ontario in 1995, for example, found that nearly half of respondents believed that there was an inherent relationship between race and criminality. Of the respondents with this view, two-thirds selected "West Indians" or "Blacks" as being the most responsible for crime (Henry et al., 1996: 472).

The continued criminalization of Black people is sustained in part by the manner in which they are depicted in various forms of popular media (Welch, 2007). Wortley (2002), for example, conducted a content analysis of stories appearing in Toronto newspapers over a two-month period in 1998. He found that almost half of all stories featuring Black people dealt with issues relating to crime and violence, compared to only 14% of stories featuring Whites. His analysis identified major racial differences in the news narratives that sought to explain criminal behaviour. While crime involving White people was almost always explained as the product of individual pathology, Black criminality was typically characterized as a group phenomenon (see also Henry & Tator, 2000; Mosher, 1998).

Contrasting with popular perceptions of Black criminality are public perceptions of criminal injustice. As part of its research, the Commission on Systemic Racism in the Ontario Criminal Justice System asked justice practitioners and members of the public about their perceptions of bias and discrimination within the system. The Commission's findings show that a significant proportion of both judges and lawyers felt that Black Canadians were treated differently in court than White Canadians in court than White Canadians (Commission, 1995). Members of the public were also asked about bias in both policing and the criminal court system. The survey found that over half of Black, White, and Chinese respondents from Toronto believed that the police treat Black people differently than White people. Similarly, over half of Black respondents and one-third of both White and Chinese respondents felt that Black people are treated differently the courts.

This study was replicated in 2007, 15 years after the initial study was conducted. What may be of surprise, in light of the myriad "race relations" initiatives that had been implemented over the previous decade, is that the more recent study found that perceptions of bias actually increased

among Black and White respondents. For example, in 1994, 76% of Black respondents felt that the police treated Black people worse or much worse than Whites. By 2007 this figure had risen to 81%. Similarly, in 1994, 48% of Black respondents believed that a Black person would get a longer sentence than a White person charged with the same crime. In 2007 this figure had risen to 58% (Wortley & Owusu-Bempah, 2009: 465).

Citizens' perceptions of criminal injustice constitute an important social issue. Not only are the police and court system reliant on the citizenry to act as witnesses and co-operate as victims, but mounting evidence also suggests that negative views of the system contribute to criminal offending (Tyler, 1988; Tyler, 2003; Tyler & Fagan, 2008). People who view the system as unjust are less likely to believe they should abide by that system's rules (Tyler, 2003). This is particularly salient in the current context. As Black people are more likely than members of other racial groups to perceive the justice system as discriminatory, they are also more likely to participate in what might be thought of as "system-generated offending behaviour."

Likewise, evidence suggests that Black youth engage in violence as a means of "self-help" resulting from the belief that the police cannot, or will not, provide them with adequate protection (Wilkinson, Beaty and Lurry, 2009). Indeed, Wilkinson et al. found that gun carrying among Black youth in their sample resulted out of a fear of victimization and a feeling that the police could not act as capable guardians (2009: 29-31). The perception that they must take the law into their own hands not only adds to the cycle of violence in disadvantaged neighbourhoods, but also increases the risk of criminalization for Black youth when they do encounter the police. Below we examine evidence of Black over-representation in three aspects of the delivery of the criminal justice in Ontario. These practices have troubling consequences for incarceration rates of young Black Canadian men.

1. Police Stop and Search Practices

Survey research conducted over the past 20 years consistently demonstrates that Black Canadians are more likely than members of other racial groups to be stopped, searched, and questioned by the police. For example, a 1994 survey of Toronto residents found that almost one-third of Black male respondents had been stopped and questioned by the police on two or more occasions in the previous two years, compared with only 12% of White and 7% of Asian males (see Wortley & Tanner, 2003: 371). Further analyses reveal that these racial differences in police contact are not explained by racial differences in social class, education, or other important demographic variables. Indeed, two factors that appear to shield White males from police contact, age and social class, do not provide Blacks with the same protection. For example, White people with higher levels of income and education are less likely to be stopped by the police than are White people with lower incomes and levels of education. On the other hand, Black people with higher levels of income and education are actually more likely to be stopped than Black people with lower incomes and levels of education (see discussion in Wortley & Tanner, 2003: 371).

A second Toronto survey involving youth paints a similar picture. Wortley and Tanner (2005: 586) asked Toronto high school students about their recent experiences with the police. Their survey found that over 50% of the Black students reported being stopped and questioned by the police on two or more occasions in the previous two years, compared to only 23% of White, 11% of Asian, and 8% of South Asian students. Similarly, over 40% of Black students said that they had been physically searched by the police in the previous two years, compared to only 17% of their White and 11% of their Asian counterparts.

A further analysis of this data demonstrates that racial differences in being stopped and searched by the police could not be explained by racial differences in criminal activity, gang membership, drug and alcohol use, or public leisure activities (Wortley & Tanner 2005). More recently, a 2007 survey of Toronto adults found that Black residents were three times more likely to be stopped and searched by the police in the previous two years and that this racial disparity could not be explained by racial differences in criminality, drug and alcohol use, driving habits, use of public spaces, poverty, or residence within a high-crime community (Wortley & Owusu-Bempah 2011).

Another source of police information that has gained an immense amount of public attention in recent years are the “contact card” or “street check” data collected by police officers in the course of their duties. These forms of data are not collected by police in every civilian encounter, but rather those for which the officer wants to record information about a stop for intelligence purposes. In addition to details about the stop, contact card and streets checks also typically garner demographic information about the civilian, such as their age, race, and gender. As such, it can be argued that the practice of ‘carding’ provides insight into police surveillance practices that typically target the individuals and neighbourhoods subject to increased levels of police scrutiny (Owusu-Bempah & Wortley, 2014).

Data from across Ontario demonstrate that Black people are over-represented in the ‘carding’ activities of a range of police services. These include Peel (Grewal, 2015), Waterloo (Sharkey, 2016), Hamilton (Bennett, 2015), London (O’Brien, 2016), Ottawa (Yogaretham, 2015), and Toronto (Rankin, 2010b). The *Toronto Star’s* analysis of over 1.7 million “contact cards” filled out by the Toronto police between 2003 and 2008 found that Black people comprised almost 25% of those documented by the police, while representing only 8.4% of the population. Interestingly, the data also indicates that Black people are over-represented in police “contact cards” for all areas of the city, regardless of neighbourhood crime rate or racial composition (Rankin, 2010a; 2010b).

The targeting of Black Canadians by the police has two main consequences for Black communities in Canada. First, because Black people are exposed to higher levels of police surveillance, they are also much more likely to be caught breaking the law than are White people

who engage in in the same forms of law violating behaviour. The Toronto high school survey discussed above, for example, found that 65% of the Black drug dealers⁶ said that they had been arrested in their lifetime, compared with just 35% of the White drug dealers (Wortley & Tanner, 2005: 586). Similarly, data recently published by the *Toronto Star* showed that between 2003 and 2013, Black people accounted for 25.5% of people arrested for cannabis possession by the Toronto Police Service while accounting for 8.4% of Toronto's population. Key here is that cannabis arrests increased in tandem with the practice of police 'carding' in Toronto over this period (Rankin and Contenta, 2017). As rates of 'carding' increased, so too did the number of cannabis possession arrests laid by the Toronto police. Therefore, race-based targeting may help explain why Black people are over-represented in arrests for cannabis possession even though empirical evidence suggests that rates of cannabis use are similar across racial groups (Hamilton et al., 2018).

A second important consequence of differential police stop and search practices is that they contribute to perceptions of criminal and social injustice. Indeed, evidence suggests that Black people who are frequently stopped and questioned by the police perceive much higher levels of bias and discrimination in the Canadian criminal justice system than do Black people who are not frequently stopped (Wortley and Owusu-Bempah, 2011). As such, these practices may signal to Black people, that irrespective of individual behaviour, being Black means being considered one of the "usual suspects" (Ibid).

2. Pre-trial Decision-Making

As gatekeepers of the criminal justice system the police influence who is officially processed by that system. Here, racial disparities at the front end in terms of stop and search, and other areas of decision making, can have serious consequences. An analysis of Toronto Police data on drug arrests carried out by the *Toronto Star* showed that Black people were not only over-represented in drug possession charges, but were also less likely to be released by the police at the scene than White people. The data indicated that 23.6% of those arrested on one count of simple drug possession were Black (compared with 8.1% of the population) and 63.8% were White (compared with 62.7% of the population). While 76.5% of White accused were released at the scene on drug possession charges, the same was true for only 61.8% of Black accused (Rankin et al., 2002a;b).

Pre-trial detention rates also varied between the two groups, as 15.5% of Black accused were held until their trial compared to 7.3% of Whites. These findings held constant, even after controlling for other relevant factors (Rankin et al., 2002a;b). A study conducted by Kellough and Wortley (2002) provides further evidence of racial disparity in pre-trial decision-making. This study tracked over 1,800 criminal cases from two Toronto bail courts during a six-month

⁶ Defined as youth who reported selling drugs on 10 or more occasions in the previous 12 months.

period in 1994. The findings indicate that 36% of Black accused were detained before trial compared to 23% of accused from other racial backgrounds. Again, race remained a significant factor even after controlling for relevant factors such as flight risk and danger to the public (Kellough & Wortley, 2002: 195-196).

Data recently released by the Ontario Ministry of Community Safety and Correctional Services shows that Black accused are also detained longer before trial than White accused (Mehler-Paperny, 2017). It is important to note that the denial of bail has serious consequences for the accused. First, the denial of bail might be used as a way to coerce guilty pleas from individuals who are reluctant to be held in detention centres for extended periods of time. Second, individuals who have been denied bail receive longer custodial sentences than individuals who are found guilty but were not held in remand before their trial (Sacks & Ackerman, 2014: 69).

3. Incarceration

Despite a decline in the overall inmate population, the number of Black offenders confined in Canadian federal correctional institutions increased by 75% in the decade leading up to 2012. Whereas Black Canadians represent just 2.9% of the overall Canadian population, they accounted for 9.3% of the total federal prison population (Office of the Correctional Investigator, 2013a). Of concern is both the increasing representation of Black Canadians in federal custody, and also their treatment within these institutions (OCI, 2013a; b; 2014; 2015; 2016; 2017). Based on consultations with Black inmates and a review of correctional data, the Office of the Correctional Investigator (OCI) produced a detailed report that documented the inequalities faced by Black inmates (OCI, 2013a).⁷

The OCI found that Black inmates consistently reported that institutional rules were applied differently to them when compared with Whites and inmates from other racial groups. Indeed, the OCI determined that between FY 2007/08 and 2011/12, the number of Black inmates facing disciplinary charges increased by 59%, whereas the overall number of disciplinary charges laid over the same period dropped by 7%. Of note, over this period, Black inmates were consistently over-represented in discretionary charge categories (those requiring judgement on the part of correctional officers), whereas they were consistently under-represented in less discretionary charge categories (such as possession of stolen property, theft and damage of property) (OCI, 2013a: 22).

Furthermore, between 2009 and 2013, despite being classified as having lower risk/needs scores, Black inmates were more likely to be placed in maximum security (OCI, 2013a: 21). In addition to being sent to higher security facilities, despite being classified on average as lower risk, Black

⁷ The Office of the Correctional Investigator acts as the ombudsperson for federal prisoners.

inmates are less likely than their counterparts to have their custody score lowered so that they could be transferred to medium or minimum security prisons. This suggests that at some point between risk classification and prison placement, Black inmates are classified as higher risk, deserving of maximum security, and at no point does it appear that this assessment reversed. The OCI has also found that Black inmates are over-represented in admissions to segregation and disproportionately involved in use of force incidents. Whereas Black inmates accounted for 9.3% of the total inmate population in FY 2011/12 they accounted for 11.7% of inmates placed in involuntary segregation (OCI, 2013a: 23). In FY 2012/13 Black inmates were involved in 13% of use of force incidents.

The bulk of evidence from the OCI report suggests that Black inmates were often not treated with dignity and respect by CSC staff. Evidence also suggests that such (mis)treatment was tied to aspects of the inmates' culture (e.g. language, dress, etc.) and the places from which they were drawn (i.e. where Black inmates lived prior to incarceration). Black inmates provided examples of over-hearing CSC staff mocking the way they spoke or trying to speak with a Jamaican accent, for example, to their colleagues. One inmate reported a correctional officer asking him "What is wrong with your tongue, don't talk to me like a hoodlum" (OCI, 2013a: 19).

Black inmates also reported numerous examples of stereotyping and that judgments about their character and lifestyle were also common. Most of the Black men described being labeled a 'gang member', a 'trouble maker', a 'drug dealer', and/or a 'womanizer' (OCI, 2013a: 17). Furthermore, among Black inmates "The gang member/affiliation stereotype" was of "particular concern" (Ibid). During the focus groups, Black inmates stated that correctional staff associated Black inmates' home postal code with gang membership. This meant that depending on home address of the inmate, Black inmates were associated with gangs from that area. Consequently, Black inmates reported that the gang label hindered their ability to obtain access to CORCAN jobs⁸, thereby leaving them working jobs that provided little valuable experience (Ibid). Indeed, while the overall prison unemployment rate in federal correctional facilities was 1.5% in 2012/2013, the unemployment rate for Black inmates was much higher at 7%. Therefore, Black inmates were disproportionately restricted from receiving hands-on training in employable skills that would aid their re-entry into society (OCI, 2013a: 20).

Black overrepresentation in corrections is also apparent at the provincial level. In 2010, Black adults accounted for 17.7% of admissions to provincial custody while making up 3.9% of the overall population (Owusu-Bempah & Wortley, 2014). Similarly, in 2011-2012, Black youth accounted for almost one-quarter (24.1%) of admissions to custody in Ontario while comprising only 3% of the province's youth population at the time (Rankin & Winsa, 2013). Notably, the incarceration rates for young men have steadily declined since the introduction of the Youth

⁸ "CORCAN is a special operating agency within the Correctional Service of Canada (CSC) that offers employment training and employability skills to offenders in federal correctional institutions, to support rehabilitation and help lower rates of re-offending." (CSC, 2016).

Criminal Justice Act in 2003; however, Black male youth have not benefitted from this decline. In fact, evidence from both the federal and provincial correctional systems indicate that incarceration is becoming increasingly concentrated among certain racialized groups, and in specific geographical areas, and that Black Canadians have been disproportionately affected by these trends. This is troubling in light of what is known about the negative consequences of concentrated incarceration.

For individuals, incarceration significantly reduces later employment rates and income levels (Freeman, 1992). Incarceration also has a significant negative influence on social networks, social relationships, and long-term life chances, thus impacting one's ability to contribute to family and community (Clear, 2008; Roberts, 2004). The families of those incarcerated also suffer financial and emotional costs related to separation, the loss of income, and the need to support an imprisoned family member (Braman, 2002; Wildeman et al., 2012).

There is evidence to suggest that the arrest of parents disrupts marital relationships, separates children from their parents, and can result in the permanent dissolution of these relationships (Christian, 2004). Research has also shown that children with parents in prison suffer serious psychological consequences, including depression, anxiety, feelings of rejection, shame, anger, and guilt (Browning et al, 2001). These children are also more likely to experience school failure, under-employment, and illegal drug use (Clear, 2008). Importantly, studies have shown parental incarceration to be a risk factor for juvenile delinquency, further exacerbating crime problems in affected communities.

The impact of concentrated incarceration clearly extends from the family unit into the community. As going to prison has a permanent impact on employment and earning potential, it also damages the labour prospects of young people in a community by decreasing the pool of individuals who can act as mentors and social contacts (Sabol & Lynch, 2004). A reduction in the number of people engaged in the labour market not only depletes supplies of human capital, but also affects the local economy because individuals have less money to spend at local establishments (Sullivan, 1989; Venkatesh, 1997). Importantly, concentrated incarceration distorts social norms, leads to the breakdown of informal social control, and therefore undermines the building blocks of social order which are essential for community safety (Clear, 2002).

In sum, concentrated incarceration can further exacerbate existing social problems, fostering a cycle of inequality within communities and across generations. The fact that incarceration is becoming increasingly concentrated amongst Black Canadians should be of a concern, precisely because it reproduces the very conditions that contribute to incarceration in the first place.

9. Expert Opinion

As documented above, Black Canadians present experiences are rooted in our country's history of colonialism, slavery and segregation. These systems, the latter of which existed well into the 20th century in Ontario, were premised on the idea that Black people are inherently inferior.

These systems also served to structure the nature of early social relations in Canada, while at the same time shaping the economic and political landscape. While White Canadians were provided opportunity to access good schools, good jobs and representation in political office, Black Canadians were largely relegated to the margins of Canadian society.

These early experiences of Black Canadians has informed the experiences of those that have come after them. Stereotypical notions about Black intellectual inferiority, the pathological nature of Black families and of Blacks' supposed innate propensity for crime, all rooted in this early period, continue to influence how Black people are treated today. The data documented above demonstrate that Black children are disproportionately removed from their families, due in part, to discrimination in child welfare assessments. Black children are deemed to be less academically inclined and thus streamed into non-university tract programs. They are also subject to harsher discipline in schools which reduces their likelihood of graduation. In the employment sector, Black people face discrimination in hiring, and at times, earn less money for similar work performed by White Canadians, resulting in increased rates of unemployment and poverty. The increased representation of Black people in impoverished neighbourhoods means that they have less access to good schools, community centres and health facilities. They are also exposed to the harsher forms of policing practiced in marginalized neighbourhoods in response to problems of crime and violence.

Importantly, Blacks' negative treatment by these institutions, and the disparate outcomes experienced within them, are cyclical and compounding. Indeed, increased exposure to the child welfare system reduces the chances of academic success, which reduces employability, thus increasing levels of poverty. These circumstances are passed from generation to generation.

The data documented above also clearly demonstrate that Black Canadians, and young Black men in particular, keenly feel the discrimination they experience at the hands of the criminal justice system. Young Black Canadians are not only over-represented in stop, search and carding practices of local police, but they serve longer periods of time in pre-trial detention, resulting in longer periods of incarceration than are others charged with the same or similar crimes. Not surprisingly, as Owusu-Bempah (2014) has found, Black male youth who perceive discrimination in policing also feel the same way about both the educational and employment sectors. Further, as Khenti (2013) notes, their experiences, personal and vicarious, with the criminal justice system contribute to the perception that they live "socially unjust lives." The conclusion is inescapable – that young Black Canadians who view the system as unjust are less likely to believe they should abide by that system's rules.

It is our opinion that the social circumstances of Black Canadians in general, and of Black male Torontonians in particular, should be viewed as criminogenic. Elevated levels of offending in the types of crime that typically come to the attention of the police (street crimes as opposed to white-collar and corporate crimes), combined with discrimination in the justice system itself have resulted in the gross over-representation of Black Canadians in our provincial and federal correctional systems. Whereas no one individual should be completely absolved of their own

responsibility when it comes to offending behaviour, the social realities that have produced or contributed to such behaviour can be acknowledged, and serve to guide judicial decision making.

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CITATION: R. v. Morris, 2018 ONSC 5186
COURT FILE NO.: CR-16-30000214-0000
DATE: 20180911

2018 ONSC 5186 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

- and -

KEVIN MORRIS

Defendant

REASONS FOR SENTENCE

NAKATSURU J.

Released: September 11, 2018