CITATION: R. v. Jackson, 2018 ONSC 2527
COURT FILE NO.: CR-17-10000505
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	))	
HER MAJESTY THE QUEEN	))	S. Adams, for the Crown
	))	
	))	
– and –	))	
	)	E. Lam and F. Mirza, for the Defendant
	)	
JAMAAL JACKSON	)	

Defendant

HEARD: March 26 and 27, 2018

JUSTICE S. NAKATSURU

[1] About making change, let me quote Dr. Martin Luther King Jr.: "Take the first step in faith. You don't have to see the whole staircase, just take the first step."

[2] So it is with sentencing Mr. Jamaal Jackson, a Black man. [1] Too many African Canadians are serving time in jail. Something more needs to be done. In this case, I hope to take a small step in changing that.

[3] I will begin by saying this. Sentencing is and has always been a very individual process. A judge takes into account the case-specific facts of the offence and the offender to determine a just and fit sentence. When it is right to do so, a sentencing judge must take into account discrimination, both systemic and blatant. This has always been the case. Judges have always had to do so.

[4] That said, there remains a problem. Disproportionately, African Canadian offenders are serving jail sentences. Often very long ones.

[5] So Mr. Jackson, this decision is about your sentence. You have pleaded guilty to possession of a prohibited gun that had one bullet in its chamber and a breach of a court order prohibiting you from having such weapons. I know that you are most worried about what your future will look like. About what your ultimate punishment will be. I heard it in your voice when you spoke to me.

[6] But, Mr. Jackson, this case is also about how the criminal justice system treats African Canadians. I have been asked to do something about changing the law. So I have had to think about this. I will apologize in advance, because this discussion will take some time. It will involve a lot of legal language. However, I must do this in order to do justice to the issues raised. To do justice for you.

[7] I will deal with some facts about your case. Then I will talk about who you are. Your life story. After this, I will then get into the law. When I do, I will be talking not only to you, but to other judges and to lawyers. Finally, I will return to your case and apply that law to your sentence.

A. SUMMARY OF THE OFFENCES

[8] The facts of these crimes are brief and simple. In 2016, the police set up a project to investigate certain persons who were allegedly committing crimes. This was called Operation Sizzle. On February 10 to 11, 2016, they came upon calls made by Mr. Jackson. These were caught by wiretaps. Mr. Jackson was arranging to get a firearm.

[9] As a result, on February 11, 2016, the police followed Mr. Jackson to an address in Mississauga where he was arrested. A search incident to his arrest discovered a .380 calibre Kruz firearm in the waistband of his pants. The pistol had one bullet in its chambers.

[10] At the time, Mr. Jackson was subject to five separate weapons and ammunition prohibition orders under the *Criminal Code*. Three of those orders were for life and two were for five years.

B. FACTS ABOUT MR. JACKSON

[11] Mr. Jackson is 33 years of age. He is single. He is originally from Nova Scotia. His family is from that province.

[12] Mr. Jackson has a serious criminal record. His first convictions were while he was still a young person in 2000. A youth court judge sentenced him to 90 days open custody with probation for four crimes he committed in London, Ontario. They were property crimes and dangerous driving. A few months later, he received 1 month secure custody for escaping lawful custody and a consecutive sentence of 2 months secure custody for uttering a threat and possession of stolen property. While still a youth in 2001, in Dartmouth, Nova Scotia, he was sentenced for offences including robbery and carrying a concealed weapon. He was sentenced to 20 months of custody. Seven months later in the youth court in Kentville, Nova Scotia, he received 3 months open custody for two assaults, one with a weapon, on top of the time he was serving.

[13] In 2003, as an adult, Mr. Jackson received a 30 day sentence for an assault. In the same year, he was sentenced to 2 years for assault cause bodily harm and failing to comply with a youth disposition.

[14] In 2007, Mr. Jackson was sentenced to 30 days jail for failing to comply with a recognizance.

[15] A year later in 2008, Mr. Jackson received his most lengthy jail sentences. On July 17, 2008, the Nova Scotia Supreme Court sitting in Dartmouth sentenced him to 42 months for two robberies and one count of disguising his face with the intent of committing a crime. This was on top of 10 months of credit for pre-trial custody. On October 24, 2008, for another robbery and two counts of failing to comply with court orders, Mr. Jackson was sentenced to a concurrent 81 months. On August 20, 2018, after being on statutory release from jail for five months, Mr. Jackson was recommitted to prison for violating the terms of that release. All the robberies involved a firearm or an imitation firearm. He committed them with other offenders.

[16] Mr. Jackson is not just the sum total of his criminal convictions.

[17] Mr. Jackson is the oldest of three children born to his mother, Karen Marsman, and his father, Rick Jackson. When Mr. Jackson was born, he lived in the Fairview/Clayton Park region of Halifax. Mr. Jackson's father served in the military. His family therefore moved a lot when Mr. Jackson was young.

[18] Ms. Marsman was originally from the Black community of Hammonds Plains, Nova Scotia. She was one of 15 children in her family. Mr. Jackson's uncles and aunts on his mother's side all did well in various jobs. Mr. Rick Jackson grew up in Mulgrave Park, an inner-city housing project.

[19] Mr. Jackson moved to Ottawa at age 2 where the family stayed for about 3 to 5 years. After this, the family moved "down home" to Cole Harbour, Nova Scotia. The family lived there until Mr. Jackson was about 12. As a child, Mr. Jackson began to get into trouble in the community and at school for stealing and fighting. The family then moved to London, Ontario. It was here that Ms. Marsman began to get seriously mentally ill and his parents' relationship deteriorated. They separated. Mr. Jackson's misbehavior escalated into criminal conduct. The family moved back to Cole Harbour when Mr. Jackson was 16 where he attended Cole Harbour high school. At high school, Mr. Jackson struggled. He only achieved a Grade 8 level of education.

[20] Since leaving high school, Mr. Jackson has spent a large portion of his life in jail. When not in custody, he has worked retail and odd jobs.

[21] At this sentencing, the defence filed letters of support for Mr. Jackson. His uncle Randolph Marsman wrote one. He writes that Mr. Jackson comes from a large family. None have been in trouble but Mr. Jackson. Mr. Marsman wonders what has gone wrong for his nephew. He writes that perhaps if his nephew had more spiritual and family support as opposed to incarceration in his youth, his life could have been different. Mr. Marsman opines that early jail did nothing but lead to further negative influences and more jail. Mr. Jackson has grown up in incarceration. Mr. Marsman describes his nephew as still having kindness in him. Mr. Marsman himself has coordinated a successful program for formerly jailed and troubled men. He offered to help his nephew once released from jail. Mr. Marsman has seen Mr. Jackson maturing and has hopes for him once he is away from the negative influence found in prison.

[22] Chaplain Imam Yasin Dwyer is a prison chaplain at Millhaven Institution and Joyceville Institution. He has known Mr. Jackson for over eight years. Mr. Jackson participated regularly in religious services. Chaplain Dwyer opined that Mr. Jackson has gone through considerable change over the years and has expressed deep remorse for his actions. Mr. Jackson in his opinion has taken spiritual steps towards taking accountability. In the Imam's view, Mr. Jackson would greatly benefit from more spiritual mentorship especially outside of an institutional setting. This would be a key to his successful community reintegration.

[23] Andrew Louis and Olga Heron are Mr. Jackson's friends. They own a boxing gym. They met Mr. Jackson through a mutual friend and Mr. Jackson began to work at their gym assisting with its upkeep and teaching boxing classes. They describe him as respectful, cheerful, diligent, and thoughtful. Mr. Jackson tried to teach the younger boxers and children using examples from his own life. They have offered Mr. Jackson employment when he is released from prison.

[24] Lastly, while in prison on these charges, Mr. Jackson has managed to complete a number of courses in anger management, problem solving, and healthy relationships. He further wishes to enroll in financial management at college.

C. SUMMARY OF RACISM AND BACKGROUND FACTORS

[25] It is not my intention to set out in full all the materials relied upon by Mr. Jackson relating to systemic racism and other background factors faced by African Canadians, in general, and in Nova Scotia, in particular. This is in part due to my views on judicial notice.

[26] However, the defence has presented significant evidence about anti-Black racism. Mr. Wright's report, which I will outline below, provides considerable historical context about the Black experience and how that history is related to criminality in Black communities.

[27] In addition, the defence presented a report dated June of 2015 called *"Civil and Political Wrongs: The Growing Gap Between International Civil and Political Rights and African Canadian Life"* written by the African Canadian Legal Clinic. In this report, aspects of anti-Black racism in Canada are outlined. The present day context of this racism include issues that led to the organization of Black Lives Matter. As well, the report details historical factors such as the negative effects of colonialism, the role of slavery in Canada, exclusion and segregation in housing, schooling, employment, and public places, and systemic and overt racism in education, policing, and the justice system. The report assesses the Canadian government's compliance with the *International Covenant on Civil and Political Rights* and finds it inadequate. The report reviews the data with respect to the incarceration of African Canadians, the police practice of carding, non-conviction records, the investigation of police shootings, the over-representation of African Canadian children in the child welfare system, the school discipline of African Canadian children, and housing and homelessness for African Canadian families. The conclusions of this report are but an extension and update of that made by Mr. Stephen Lewis who was appointed as an Adviser on Race Relations to the Premier of Ontario in June of 1992. Mr. Lewis states (at p. 2 of his letter to Premier Rae):

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

D. SUMMARY OF THE IMPACT OF RACE AND CULTURAL ASSESSMENT

[28] An Impact of Race and Culture Assessment (IRCA) is an attempt to articulate the issues of anti-Black racism and systemic racism in Canadian society to the court at the sentencing stage of adjudicating African Canadians. A founding premise of IRCAs is that a person's race and cultural heritage should be considered as a significant factor in considering their sentence in a criminal matter.

[29] The author of the report, Mr. Robert Wright, is a registered social worker and a sociologist. He is also an African Nova Scotian who has spent a significant amount of time studying and working on issues of race and culture generally and those affecting African Nova Scotians in particular. Mr. Wright prepared this report by interviewing Mr. Jackson, his family members, and his Imam, as well as reviewing academic literature.

[30] Mr. Wright reports that Mr. Jackson self-identifies as an individual with both Indigenous and African Nova Scotian heritage. Aboriginal Legal Services could not confirm his Indigenous heritage and thus were unable to complete a *Gladue* report. However, in Nova Scotia, there is a long history of persons of mixed Indigenous/African heritage.

[31] African Nova Scotians, like many North Americans of African descent, have a long and tragic history marked by systemic discrimination, marginalization and systemic recruitment into criminality coupled with targeted and excessive policing which results in disproportionate incarceration and differential experiences while incarcerated. Mr. Wright notes:

a. Economic and urbanizing forces have caused the displacement of African Nova Scotian communities, the most dramatic example of this being Africville.

b. Many African Nova Scotians were historically employed in labor and domestic work. In the modern economy, however, the increased demand for education has been problematic as African Nova Scotians were less well integrated and supported in the education system.

c. African Nova Scotians have been recruited into drug trafficking by white ethnic criminal organizations.

d. Academic study of the African Nova Scotian community has documented a community dynamic where personal affronts are taken extremely seriously and are seen as requiring a violent response.

[32] Mr. Jackson's personal history of early racial conflict, identity confusion, and family disruption created the conditions for him to slide easily into criminality:

a. Mr. Jackson lived in Cole Harbour, Nova Scotia, until the age of 12. The family moved to London, Ontario, for five years, and then returned to Cole Harbour, where Mr. Jackson attended high school. The community has a well-documented history of racial tension. Mr. Jackson expressed that as a light-skinned Black child, he was often seen as too Black to be accepted among his white peers, but too white to be accepted by his Black peers. Mr. Jackson stated that he would throw rocks at passing cars and steal brand-name clothes from white peers, and felt that he had to do these things in order to "fit in".

b. Mr. Jackson's father served in the military and was often away from home when he was a child, although he did stay in touch with Mr. Jackson. This lack of paternal presence seems to have made Mr. Jackson prone to seeking the attentions and affirmations of his male peers. At some point in Mr. Jackson's early teens, his parents separated.

c. Mr. Jackson's mother also developed serious mental health problems while he was in his early teens. While Mr. Wright did not see any medical documents

related to Mr. Jackson's mother, he states that her symptoms as described by Mr. Jackson are consistent with a severe and persistent psychotic disorder, causing her to lose touch with reality and become disordered in her thinking. As a result, Mr. Jackson was left to care for his younger brother on his own, and often followed his mother around town to keep her safe. Mr. Wright found that Mr. Jackson, his uncle, and brother, were extremely evasive when it came to the details of his parents' relationship and his mother's illness. It seemed to be a source of enduring sensitivity and shame for the family.

[33] Mr. Jackson was arrested as a result of Operation Sizzle, which targeted the criminal association known as Heart of a King. This group is associated with North Preston's Finest, a criminal organization based in Nova Scotia. While it is no doubt a criminal organization, it is possible that its origins were more benign –as a community network among African Nova Scotians that helped them stay connected to their roots. This is important to understand when assessing the extent to which an individual is engaged in an ethnic criminal organization. Mr. Wright notes that Mr. Jackson was arrested shortly after he was released from an Ontario prison, and went to Toronto knowing very few people and connecting with the few Scotians he knew from "down home".

[34] Despite Mr. Jackson's lengthy criminal history, Mr. Wright opines that he is not an individual who comes from a background that would suggest the development of deep antisocial and criminal tendencies. There appears to be limited deep criminality within his extended family, and though he had a difficult upbringing it was not due to desperate poverty or violence. Mr. Jackson's criminal affiliation seems to be a "seeking" after culturally and gender affirming role models and associates.

[35] In Mr. Wright's view the clinical effects of being raised by a mentally ill mother created developmental and emotional needs that Mr. Jackson sought to meet in unhealthy ways. Properly understood, these needs can be explored and supported through counselling and culturally informed programming.

E. THE POSITION OF THE PARTIES

[36] The Crown seeks a sentence of 7.5 to 9 years for the possession of a firearm with ammunition and 1 year consecutive for the breach of a prohibition order for a total sentence of 8.5 to 10 years. The defence seeks a sentence of 4 years in total. There is thus a stark difference between their positions.

[37] The Crown focuses her submissions on deterrence, denunciation, and the protection of the public. She argues that Mr. Jackson had been barely out for 7 months after finishing his sentence on his previous robbery convictions when he was apprehended on this gun charge. When the police were investigating a number of individuals in Operation Sizzle, they fortuitously came upon Mr. Jackson who was seeking a firearm. They arrested him when he had just gotten a gun from a seller. These are aggravating circumstances. These offences were committed by a man with a serious prior criminal record. On behalf of the Crown, Ms. Adams does not take issue with the information in the report of Mr. Wright. However, she submits that this type of information is more pertinent to how CSC will deal with him in jail. She submits that in sentencing African Canadians, this type of information should not be mandatory. Further, in Mr. Jackson's case, this information does little to diminish his culpability. Rather, in this case, the need for deterrence and denunciation overwhelms other sentencing considerations. Alternatively, even if one were to accept the defence analysis, Ms. Adams argues that the systemic or background factors regarding race have little relevance to the individual circumstances of Mr. Jackson.

[38] The defence starts with the fact that Mr. Jackson has pled guilty and has shown his remorse. While the plea before me was not early, Mr. Jackson had wanted to plead guilty after his discovery preliminary inquiry. The defence submits that while gun offences are serious, in this instance, Mr. Jackson had possession of a gun for only a short time, little more than an hour. The defence canvassed Mr. Jackson's background. It is here that the defence submits that the IRCA and the systemic factors regarding Mr. Jackson's background and race are important. It is through this lens that his moral culpability should be viewed. The defence argues that the analysis applied by the courts to Indigenous offenders as set out in *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688 should also be applied to African Canadian offenders. When such an analysis is conducted, the defence contends that a 4 year sentence can be supported. Further, the defence points to all the programming Mr. Jackson has done while in custody. He has the support of family and friends despite his criminal history. The defence submits that there is still a prospect of rehabilitation for Mr. Jackson and this should be taken into account.

[39] What I would like to do is to start by addressing how issues of race and discrimination should factor into my decision. I begin by setting out the systemic problem of the disproportionate incarceration of African Canadians.

F. THE DISPROPORTIONATE INCARCERATION OF AFRICAN CANADIANS

[40] Stripped to its essentials, African Canadians have been jailed three times more than their general representation in society for quite some time. The problem is not getting better.

[41] Several Office of the Correctional Investigator (OCI) studies confirm this. The OCI serves as an ombudsman for federally sentenced offenders and investigates offenders' complaints regarding the Correctional Service of Canada (CSC). The OCI writes annual reports that highlight areas of concern and issues recommendations based on the research of the OCI and his staff. The OCI writes that federally African-Canadians currently constitute 8.6% of the total incarcerated population, while only representing 3% of the total population in Canada.[2]

[42] As far back as 1995, the Commission on Systemic Racism in the Ontario Criminal Justice System documented this massive over-representation of Blacks and noted that the degree of over-representation was even higher for Black women.[3] In addition, there is evidence that this over-representation is linked with what has become known as the "war on drugs."[4]

[43] In terms of how quickly the African Canadian federal inmate population has increased, the OCI has kept data. The OCI's 2011/12 Annual Report identified Black inmates as one of the fastest growing sub-populations in federal corrections. From 2002 to 2012, the number of federally incarcerated Black inmates increased by 75%. From 2005 to 2015, the Black inmate population grew by 69%.[5] From 2003 to 2013, African Canadian federally sentenced inmates have increased each year growing by nearly 90% while white inmates declined by 3% over the same period.[6] These increases have occurred though the problem has been consistently raised.[7]

[44] In the most recent 2016/2017 OCI report, Black inmates comprised 8.6% of the total incarcerated population. While the total number of Black inmates has decreased by 9% since the OIC's 2013 study, the overall inmate population has also decreased (by 6.3%) over the same period. Ontario continues to have the largest Black inmate population – nearly three times the number in the Quebec region (the region with the second largest Black inmate population).

[45] This over-representation has received scrutiny in 2012 from The United Nations Committee on the Elimination of Racial Discrimination which stated that African Canadians face harsher treatment by the

police and higher rates of incarceration.[8] They also face higher rates of pre-trial detention and are more likely to be impacted by mandatory minimum sentences.[9] The Committee suggested that:

> Canada "take necessary steps" to prevent over incarceration, and train actors in the criminal justice system including police and judges on the principles of the International Convention on the Elimination of All forms of Racial Discrimination of which Canada is a signatory.[10]

[46] In October 2016, the UN Working Group of Experts on People of African Descent visited Canada to observe the human rights situation of African Canadians. The Working Group recommended (among other things) the development and implementation of a National Corrections Strategy to correct the disproportionately high rates of African Canadians within the correctional system and ensure anti-discriminatory and culturally specific services for African Canadian offenders.

[47] In the Annual Report of 2016/2017, the OCI encouraged the CSC to take into consideration factors that disproportionately impact on Black Canadians, much like Indigenous social history is used in respect of Indigenous offenders.

[48] At this point, let me say the following based on this evidence. It is trite that there are many complex reasons why African Canadians are disproportionately incarcerated. Any failures in the criminal justice system are but a part of the problem. Sentencing judges cannot fix this problem alone. That said, I cannot be blind or indifferent to it.

Systemic Discrimination while in Custody

[49] The defence submitted materials relating to discrimination against African Canadians while they served their sentences in jail. In particular, the defence has relied on a report published in 2013 by the OCI called "*A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries*". This report was intended to describe the experiences of and outcomes for Black inmates in federal penitentiaries and to assess and review the actions taken by CSC in responding to their needs.[11]

[50] All Black inmates reported experiencing discrimination by other inmates and correctional officials. Much of the behaviour exhibited by CSC staff would fall within what academic literature describes as "covert discrimination". Many inmates talked about feeling ignored by prison staff, and that their concerns were dismissed. Other instances were more overt. Most of the Black male inmates described being labeled a 'gang member', 'trouble maker', 'drug dealer', and/or a 'womanizer'. Black women inmates also described being labeled as 'trouble makers' when they congregated. Black inmates also reported instances of being mocked for their accents.

[51] The 'gang member' stereotype was a particular concern of Black male inmates. While, as of 2013, Black inmates were nearly two times more likely than the general inmate population to have a gang affiliation - 21.3% vs. 12.3% - the majority did not have such an affiliation. They felt as though everything they did or said was assessed through this lens, and reported that this label often prevented them from obtaining work within their prisons.

[52] Black inmates felt that more representative staff was required in prison, and that correctional programs did not adequately reflect their lived experience. Partnerships between CSC and Black community groups and organizations were limited or non-existent. Black inmates felt strongly about a lack of access to food that was consistent with their culture and traditions, and the lack of personal care products suited to their needs.

[53] Despite being rated as having a slightly lower risk to re-offend and lower-need overall as compared to the general inmate population, Black inmates are more likely to be placed in maximum security institutions. Black inmates are released later in their sentence (lower parole grant rates) and are less likely to be granted temporary absences. On many indicators of correctional performance, Black inmates fell behind that of the general inmate population. They were:

- More likely to incur institutional charges.
- Less likely to be employed, particularly in jobs of trust or in CORCAN (a CSC program that provides job training).
- Slightly over-represented in segregation placements.
- Over-represented in use of force incidents.

[54] In the 2016/2017 OCI Annual Report, the OCI updated the situation since the 2013 study. While the CSC's response was positive overall, four years later very little appears to have changed for Black people in federal custody. As a group, Black inmates continued to have poorer outcomes on many important correctional indicators: classification as maximum security; admissions to segregation; involvement in use of force; more likely to be labelled gang affiliated.

G. APPLICATION OF *GLADUE* PRINCIPLES TO AFRICAN CANADIANS

[55] Indigenous people are also jailed too often and for too long. This was the conclusion of the Supreme Court of Canada in *Gladue*.

[56] The defence asks that I apply the *Gladue* approach used in sentencing Indigenous persons to the sentencing of African Canadians. They submit that the two groups have similar sources of disadvantage and have suffered similar discrimination.

[57] I find little value in comparing the situation of Indigenous persons to African Canadians. There are similarities but there are also significant differences. Both communities have shared the legacies of colonialism, the effects of inter-generational trauma, and racism. Both communities are plagued with persistent socio-economic disadvantage and poverty. Both communities are also resilient and have vibrant, diverse, and proud cultural traditions. On the other hand, each are distinctive in their own way. The relationships they have with state institutions such as the criminal justice system reflect different lived experiences and socio-political realities. In my opinion, the voices of each community deserve to be heard on their own individual terms.

[58] Aside from this, I would like to emphasize that the sentencing of Indigenous persons is unique. This is based upon the recognition of their special place in the *Criminal Code*, the *Constitution Act, 1982,* and our country's history. Section 718.2(e) of the *Criminal Code* expressly states:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> > (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders.*[Emphasis added]

[59] No one can gainsay the statement that the history of Indigenous peoples in Canada is distinctive. No one else has had to survive residential schools. No one else was subject to policies of cultural genocide. No one else is owed the obligations owed to the original peoples by those who came later. Those who tried to dispossess them of their land, culture, law, and identity.

[60] So as I will discuss below, while there is much to be gained from the jurisprudence regarding the sentencing of Indigenous persons, the sentencing of African Canadians should not be approached by simply layering a *Gladue* template on top.

H. THE CASES OF *BORDE* AND *HAMILTON*

[61] *Borde* and *Hamilton* are both Ontario Court of Appeal cases. Therefore, I must address them. They are binding on me. But they have much to offer in analyzing the sentencing issues raised. They further raise potential obstacles to the direction Mr. Jackson asks that I take. As a result, I must make a closer examination of what they mean for Mr. Jackson's case.

[62] In *R. v. Borde*, (2003) 2003 CanLII 4187 (ON CA), 63 O.R. (3d) 417, (C.A.), the Ontario Court of Appeal was specifically asked to do what I am being asked to do. That is simply apply *Gladue* to African Canadians. Rosenberg J.A. declined to do so.

[63] Mr. Borde was a young African Canadian man who had a gun. When chased by some men, he fired a number of shots into the air. On another day, Mr. Borde pistol-whipped a victim, and fired a bullet while doing so. This occurred in an area of subsidized housing in downtown Toronto. Mr. Borde appealed the sentence that he received. During the course of that sentence appeal, he introduced a volume of fresh evidence regarding the systemic racism he and other young Black youth faced in Toronto. Mr. Borde argued in part that the court could take judicial notice of systemic racism against the African Canadian community just as the courts had been directed to do in *Gladue* to take judicial notice of systemic racism against Indigenous persons.

[64] While Rosenberg J.A. accepted that there were some similarities between them, he found this fresh evidence was not admissible. The essence of this decision by Rosenberg J.A. was that on the facts of the case, the offences were so serious the *Gladue* approach would not have yielded a different result. Secondly, Rosenberg J.A. noted the unique situation of Indigenous offenders. Section 718.2(e) specifically places an affirmative duty on judges that only applies to Indigenous offenders. Furthermore, he notes that the traditional common law sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of punishment held by Indigenous offenders and communities. This link to traditional concepts of restorative justice was missing from the fresh evidence presented on behalf of Mr. Borde.

[65] Rosenberg J.A. did, however, hold that the background factors were far from irrelevant and indeed were important because they could impact upon the offender and the crimes he committed. He noted that the sentencing principles applicable to all offenders were sufficiently broad and flexible enough to enable a sentencing court, in appropriate cases, to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community that the offender came from.

[66] In my view, the decision of *Borde* does not bar Mr. Jackson from pursuing the arguments he does. First of all, in light of *R. v. Ipeelee*, 2012 SCC 13 (CanLII), [2012] 1 S.C.R. 433, which was decided almost a decade later, Rosenberg J.A.'s focus upon the seriousness of the offences must be re-

evaluated. The Supreme Court of Canada emphatically stressed that the *Gladue* analysis must be applied regardless of the seriousness of the offences and was critical of appellate courts that suggested otherwise.

[67] Meanwhile, his comments about the relevance of systemic factors remain instructive. Therefore, as I read the decision, *Borde* is an invitation for a sentencing judge in the right case to address the problems that was raised by the proposed fresh evidence. To address them through a more innovative sentencing approach to African Canadian offenders.

[68] The sentencing judge in *R. v. Hamilton and Mason*, (2003) 2003 CanLII 2862 (ON SC), 172 C.C.C. (3d) 114 (Ont. S.C.J.), tried to do this. Those cases involved single African Canadian females who were being sentenced for importing cocaine. They were couriers. The sentencing judge introduced hundreds of pages of his own research on the societal problems faced by those who shared the offenders' race, gender, and socio-economic circumstances. From this he concluded that they were particularly vulnerable targets to those who sought out couriers to smuggle in illegal drugs into Canada. He found that their personal responsibility was significantly diminished by the effects of systemic racial and gender bias. He gave both offenders conditional sentences as a result.

[69] The Crown appealed. In *R. v. Hamilton and Mason*, (2004) 2004 CanLII 5549 (ON CA), 72 O.R. (3d) 1 (C.A.), Doherty J.A. held that the sentencing judge erred by assuming the combined role of advocate, witness, and judge by unilaterally raising issues not raised by the parties and becoming the prime source of information about those issues. While the sentences imposed reflected errors in principle by permitting them to be served in the community, Doherty J.A. agreed with their length. Ultimately, he found that the offences merited substantial prison terms despite the mitigating effects of the offender's personal circumstances.

[70] On one level, *Hamilton* can be readily distinguished from the case at bar. Here, Mr. Jackson raised the issue. Mr. Jackson has presented the evidence in the form of Mr. Wright's report and other materials. Mr. Jackson submits that the *Gladue* analysis should be applied for African Canadians. None of this originates from me.

[71] However, Doherty J.A.'s reasons go beyond simply reversing a sentencing judge for overstepping the proper boundaries of his role. To start, Doherty J.A. noted that on the appeal Ms. Hamilton and Ms. Mason addressed at some length the potential application of s. 718.2(e) to groups like African Canadians who have been the victims of discrimination in the justice system and the community at large. Like Rosenberg J.A. in *Borde,* Doherty J.A. pointed out the differences between Indigenous offenders and those of other marginalized communities. He held that Parliament had chosen to identify Indigenous persons as a group to whom the restraint principle in s. 718.2(e) applies with particular force given the historical mistreatment of and the cultural views of that group which made imprisonment ineffective in achieving the goals of sentencing. While he accepted that s. 718.2(e) could apply to other identifiable groups in society, there was nothing in the mass of materials in Ms. Hamilton and Ms. Mason's cases to suggest that poor Black women shared a cultural perspective with respective to punishment that was akin to the Indigenous perspective.

[72] At the same time, Doherty J.A. recognized the potential importance of such materials. What he found fault with was the lack of any evidentiary link between the social context provided by that material and the particular circumstances of the two offenders whose sentences had been significantly decreased by it. In the course of his reasoning, he confirmed what was earlier said in *Borde* that such evidence could play a significant role in the sentencing of an individual. Doherty J.A. said this at paras. 134 to 135:

> A sentencing judge is, however, required to take into account all factors that are germane to the gravity of the offence and the personal culpability of the offender. That inquiry can encompass systemic racial and gender bias. As the court explained in *R. v. Borde*, *supra*, at p. 428 O.R., p. 236 C.C.C.:
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>> However, the principles that are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence. . . .
>
> Reference to factors that may "have played a role in the commission of the offence" encompasses a broad range of potential considerations. Those factors include any explanation for the offender's commission of the crime. If racial and gender bias suffered by the offender helps explain why the offender committed the crime, then those factors can be said to have "played a role in the commission of the offence".

[73] In my opinion, because of *Borde* and *Hamilton*, it is both inappropriate and unnecessary to try and analogize the historical and current circumstances of African Canadians to Indigenous persons or to simply unthinkingly apply a *Gladue* type analysis to Mr. Jackson. Within the sentencing principles that currently exist, I believe there is room to build a framework of analysis that can begin to address the issue of disproportionate incarceration of African Canadians.

[74] I will say more about Doherty J.A.'s decision in *Hamilton* as I explain the approach I intend to take with respect to sentencing Mr. Jackson. For the moment, I find that there is support for the approach argued for by Mr. Jackson in these two authorities even though similar arguments, made a decade and a half ago, were not fully accepted.

I. THE FRAMEWORK FOR SENTENCING MR. JACKSON

1. The Source of Authority

[75] Where then does my authority reside for taking into consideration the systemic problem of the over-incarceration of African Canadians when sentencing Mr. Jackson? While systemic factors have been accepted as appropriate considerations for sentencing an individual, there has been less discussion about how those same factors can be considered in addressing the issue of the over incarceration of African Canadians. Where does the judge have the authority to use that social context in remedying the broader issue of over-incarceration in the individual sentencing a specific offender?

[76] Section 718 is the answer. While *Gladue* is renowned for changing the sentencing analysis for Indigenous people, the Supreme Court of Canada does a more expansive interpretation of s. 718 in general. The court noted at para. 43 that considerations of acknowledging harm, providing reparations to victims/communities, and promoting responsibility in offenders, were added to the traditional ones of separation, deterrence, denunciation, and rehabilitation when significant amendments were made to the sentencing provisions of the *Criminal Code*:

> ….Restorative sentencing goals do not usually correlate with the use of prison as a sanction. *In our view, Parliament's choice to include (e) and (f) [in s. 718] alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders.* [Emphasis added.]

[77] As for s. 718.2(e), which refers to alternatives to incarceration, Cory and Iacobucci JJ. state at para. 39 that the enactment of the section was meant to be remedial. This is true for all offenders, not just Indigenous offenders and communities. Therefore, when interpreting s. 718.2(e), the principle of restraint now incorporates the concept of restorative justice for all offenders.

[78] More explicitly, the court referred to the social context surrounding the enactment of the provision. They held that the intent of the provision was to deal with the problem of over incarceration in general in Canada and the acute problem of the disproportionate jailing of Indigenous people. The court referred to statistics and information where imprisonment was being imposed with little regard for its effectiveness. The court concludes at para. 57:

> Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Over incarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(e) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions.

[79] It is the remedial nature of s. 718.2(e) that provides the authority for me to address the disproportionate imprisonment of African Canadians. While Parliament did single out Indigenous persons for special attention, its enactment benefits all offenders. For African Canadians, given the evidence presented to me, disproportionate incarceration is an acute problem. Section 718.2(e) can be resorted to in order to address this particular problem. It is further meant to encourage restorative approaches in the application of the sentencing principle of restraint.

[80] The next question is what should this sentencing approach look like? In answering this question, as acknowledged in *Borde,* the framework set out in *Gladue* can provide very useful guidance.

2. Judicial Notice of Systemic Factors

[81] An important part of the *Gladue* analysis is about process. Sentencing judges are required to take judicial notice of many important matters that impact that process. In *Ipeelee* this is what LeBel J. said at para. 60 about what the courts must take judicial notice of in the context of sentencing Indigenous offenders:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27 (CanLII), 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.

[82] I find that for African Canadians, the time has come where I as a sentencing judge must take judicial notice of such matters as the history of colonialism (in Canada and elsewhere), slavery, policies and practices of segregation, intergenerational trauma, and racism both overt and systemic as they relate to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration.[12] While this does not in and of itself justify a different sentence, it is an important first step in providing the necessary context in which to understand the case-specific information in sentencing. I have come to this conclusion not simply because it provides substance to the principle of restraint found in s. 718.2(e), but also because it is in keeping with the development of the doctrine of judicial notice and the legal recognition in the jurisprudence of the discrimination against African Canadians.

[83] A sentencing judge is given the opportunity to obtain relevant information about the offender and his background without the restrictive evidentiary rules common to a trial. The judge has wide latitude as to the sources and type of evidence upon which to base their sentence: *R. v. Gardiner*, 1982 CanLII 30 (SCC), [1982] 2 S.C.R. 368 at para. 109. This includes taking judicial notice of the social framework in which the law is to operate at sentencing: see D.M. Paciocco (as he then was) "*Judicial Notice in Criminal Cases: Potential and Pitfalls*" (1998), 40 C.L.Q. 35 at 51.

[84] Judicial notice dispenses with the need for the proof of facts that are clearly uncontroversial or beyond reasonable dispute: *R. v. Find,* 2001 SCC 32 (CanLII), [2001] 1 S.C.R. 863 at para. 48; *Newfoundland (Treasury Board) v. N.A.P.E.,* 2004 SCC 66 (CanLII), [2004] 3 S.C.R. 381 at para. 56. For social framework facts, the test for judicial notice is even more relaxed. A judge is entitled to take judicial notice of a fact if it would be accepted by reasonable people who have taken the trouble to inform themselves of the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used: *R. v. Spence,* 2005 SCC 71 (CanLII), [2005] 3 S.C.R. 458 at para. 65.

[85] It is well accepted that judges can apply their knowledge and experience they have acquired while on the bench in sentencing. In *R. v. Lacasse*, 2015 SCC 64 (CanLII), [2015] 3 S.C.R. 1089, the Supreme Court of Canada found it appropriate for a trial judge to take judicial notice of the local conditions of the community where the crime took place. See also *R. v. M. (T.E.)*, 1997 CanLII 389 (SCC), [1997] 1 S.C.R. 948 at para. 16; *R. v. R.D.S.,* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 59.

[86] Taking judicial notice of the historical and systemic injustices committed against African Canadians and African Canadian offenders is preferable to a strict adherence to the traditional rules of evidence which will only serve to advantage the *status quo.* The offender should not be burdened with the requirement to bring such evidence, usually in the form of expert evidence, to their sentencing when these social and historical facts are beyond reasonable dispute.

[87] This has indeed been the trend of the case law in other areas of the criminal law. Here is but a sample of the comments made that reflect this acceptance:

R v Parks, (1993) 1993 CanLII 3383 (ON CA), 84 C.C.C. (3d) 353 (Ont. C.A.), at para. 54 (Jury Selection):

> Racism, and in particular anti-Black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.

R. v. R.D.S., 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 47 (Social Context Judging):

> …It follows that judges may take notice of actual racism known to exist in a particular society. Judges have done so with respect to racism in Nova Scotia. In *Nova Scotia (Minister of Community Services) v. S.M.S.* (1992), 110 N.S.R. (2d) 91 (Fam. Ct.), it was stated at p. 108:
>
>> [Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report (sub. nom. Royal Commission on the Donald Marshall, Jr., Prosecution). A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally.

R. v. Golden, 2001 SCC 83 (CanLII), [2001] 3 S.C.R. 679, at para. 83 (strip searches):

> ….Furthermore, we believe it is important to note the submissions of the ACLC and the ALST that African Canadians and Aboriginal people are overrepresented in the criminal justice system and are therefore likely to represent a disproportionate number of those who are arrested by police and subjected to personal searches, including strip searches…As a result, it is necessary to develop an appropriate framework governing strip searches in order to prevent unnecessary and unjustified strip searches before they occur.

R. v. Brown (2003), 2003 CanLII 52142 (ON CA), 64 O.R. (3d) 161 (C.A.), at para. 9 (Racial Profiling):

> In the opening part of his submission before this court, counsel for the appellant said that he did not challenge the fact that the phenomenon of racial profiling by the police existed. This was a responsible position to take because, as counsel said, this conclusion is supported by significant social science research. I quote from the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer for Ontario, 1995) (Co-Chairs: M. Gittens and D. Cole) at p. 358:
>
>> The Commission's findings suggest that racialized characteristics, especially those of Black people, in combination with other factors, provoke police suspicion, at least in Metro Toronto. Other factors that may attract police attention include sex (male), youth, make and condition of car (if any), location, dress, and perceived lifestyle. Black persons perceived to have many of these attributes are at high risk of being stopped on foot or in cars. This explanation is consistent with our findings that, overall, Black people are more likely than others to experience the unwelcome intrusion of being stopped by the police, but Black people are not equally vulnerable to such stops.

R. v. Grant, 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353 at para. 154 (Arbitrary Detentions):

> A growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified "low visibility" police interventions in their lives…The appellant, Mr. Grant, is Black. Courts cannot presume to be colour-blind in these situations.

R. v. Spence, 2005 SCC 7 (CanLII), [2005] 3 S.C.R. 458 at para. 5 (Jury Selection):

> The courts have acknowledged that racial prejudice against visible minorities is so notorious and indisputable that its existence will be admitted without any need of

> evidence. Judges have simply taken "judicial notice" of racial prejudice as a social fact not capable of reasonable dispute…

[88] All of the above noted cases cite and rely upon extensive studies demonstrating that anti-Black racism is worthy of judicial notice.

[89] Further there is precedent for this approach in sentencing African Canadian offenders. Either by way of acknowledging the social context of the offender's background or by way of taking judicial notice, other sentencing judges have taken race into account in sentencing African Canadian offenders: see *R. v. Reid*, 2016 ONSC 954 (CanLII), 128 W.C.B. (2d) 244, at paras. 26-27; *R. v. Peazer*, [2003] O.J. No. 6283 (S.C.J.) at paras. 58-59.

[90] In my opinion, there are some very practical advantages in taking this judicial notice. The offender will often have limited or no resources to retain experts. Not every offender will be able to access or afford the type of information provided by Mr. Wright. Taking judicial notice of these systemic issues is a good way to avoid this problem. For instance in *R. v. Bryce,* [2016] O.J. No. 6868 (S.C.J.) at para. 32, taking judicial notice could have assisted when scant evidence was presented about the social context of the African Canadian offender who was being sentenced for gun crimes. In *R. v. Duncan,* [2012] O.J. No. 2966 (S.C.J.) at para. 86, the sentencing judge declined to apply *Gladue* principles or to consider systemic and racial bias for an African Canadian offender given the lack of any evidentiary basis to do so.

[91] Permitting this is not unfair to the Crown since it applies only to those matters that properly should be subject to judicial notice. Any particular dispute about what is a suitable subject of such notice can be resolved on a case-by-case basis.

[92] It is my belief that provided it is not forgotten that this social context is an aid that complements but does not supplant the traditional sentencing process which is focused on proportionality, no harm will be suffered and only benefit will be gained. Taking judicial notice of such uncontroverted matters will make effective use of the limited resources of the courts. It will encourage better education of sentencing judges about these important systemic issues and increase their sensitivity to them. As stated by Abella J. in the *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25 (CanLII), [2015] 2 S.C.R. 282, at para. 34:

> Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand "life" – their own and those whose lives reflect different realities.

3. A Duty to Acquire Case-Specific Information/the IRCA Report

[93] Mr. Wright has written an extensive IRCA report. Quite fairly, Ms. Adams did not object to its admission. She did not cross-examine Mr. Wright. Mr. Wright remained available for questioning during the hearing. Mr. Jackson argues that there should be a presumption in favour of such a report unless the offender expressly waives the necessity of having one prepared. In essence, Mr. Jackson analogizes the IRCA report to a *Gladue* report.

[94] I am not persuaded that this is the right approach for the following reasons.

[95] First of all, I recognize that 718.2(e) makes it mandatory for a sentencing judge to consider all available sanctions other than imprisonment. However, IRCA reports are not mandatory. Indeed, strictly speaking, *Gladue* reports are not mandatory.[13] What is required by *Gladue* is that case-specific

information about an Indigenous offender be provided in a comprehensive and timely fashion. There is further a duty on the part of the sentencing judge to make reasonable attempts to acquire such information regardless of the actions of the parties. I whole-heartedly endorse the preparation of *Gladue* reports. *Ipeelee* explicitly endorses them. They have been invaluable. Any expansion of the use of similar reports for other minority groups should only be encouraged.

[96] But Parliament has paid particular attention to Indigenous offenders in s. 718.2(e). This imposes greater obligations upon the sentencing judge in sentencing Indigenous offenders compared to other offenders: *Borde* at para. 31.

[97] IRCAs originated in Nova Scotia. They have been admitted in the trial courts and have been used to great effect on sentencing: see *R. v. X,* [2014] N.S.J. No. 609 (Prov. Ct.); *R. v. Gabriel,* 2017 NSSC 90 (CanLII), 138 W.C.B. (2d) 294; *R. v. E.S.,* 2015 NSPC 81 (CanLII), [2015] N.S.J. No. 524; *J.C. (Re)*, 2017 NSPC 14 (CanLII), 138 W.C.B. (2d) 639; *R. v. Middleton,* unreported, November 7, 2016, (N.S.P.C). This is what Campbell J. said in *Gabriel* about the Cultural Assessment report provided to him when he was determining parole ineligibility, at para. 49:

> Aboriginal offenders are treated differently. The Cultural Assessment in this case does not have the same constitutional implications as a *Gladue* report. But that doesn't mean it isn't vitally important. It is a historical fact and present reality that African Nova Scotians were and continue to be discriminated against. As the criminal justice system must take into account the overrepresentation of Aboriginal people in custody, it must also take into account the effects of discrimination on members of the African Nova Scotian community.

[98] It is not my role to decree how information should be presented in an individual case when dealing with an African Canadian offender. In my view, while IRCAs can be invaluable when sentencing African Canadians, they are not mandatory. Nor is it mandatory for trial judges to apply systemic or background factors in sentencing African Canadians in the sense that failure to do so would amount to an error in principle unless explicitly waived by the offender. It all depends upon the issues raised by the parties and how the case is presented. While I acknowledge the problem of the over incarceration of African Canadians is a pressing one and that a significant albeit incomplete solution to that problem can be the sentencing process, this sentencing still takes place within the existing adversarial system.

[99] So, in my view, what is mandatory is that a sentencing judge arrive at the fit and proportionate sentence. What is mandatory is that the judge has the information required to arrive at that sentence. When the case calls for it, a sentencing judge should take any relevant systemic or background factors into consideration. They should also have sufficient information to do that. Section 723(3) of the *Criminal Code* permits a judge to order the production of evidence that would assist in the determination of the appropriate sentence. Further s. 723(4) allows the court to compel the appearance of any person who is a compellable witness and can assist. Finally, under s. 721(4) the court can require a pre-sentence report to contain information on any matter after hearing arguments from the parties. Thus, when appropriate, these provisions can provide a vehicle whereby the sentencing judge can obtain further information in order to do justice in the individual case: *Borde* at para. 32.

[100] Of course, this can take the form of an IRCA. But this depends very much on the issues raised and the position of the parties on sentencing. They may or may not prepare an IRCA or a similar report. A sentencing judge may or may not require further information. There is no one right way to go about determining a fit and proportionate sentence for an African Canadian offender. Whatever the process, though, as *Hamilton* cautioned against, a judge must take care not to become an advocate or an inquisitor.

[101] Before leaving this topic, I want to make sure that my reasons are not misinterpreted. I do not want to be seen as undervaluing an IRCA. I believe they are very helpful. They give voice to the offender and African Canadian communities in the sentencing process. IRCAs have the potential to provide a bridge between an accused's experience with racial discrimination and the problem of over-incarceration. An IRCA can provide insight into areas that are not always within the knowledge of some jurists. For example, poverty and systemic discrimination in education, employment, and criminal justice and how the impacts of discrimination can span over generations. Other topics in an IRCA could include:

- Socio-economic hardship such as unemployment, lower income, and living in subsidized housing, as well as the duration of these experiences;
- Adversity from single parenthood: either growing up in a single parent home or being a single parent;
- Fallout from mental illness of a parent or the offender;
- Child services interventions and apprehensions;
- Illicit substance use and addiction issues, whether suffered personally or by parents or friends;
- Educational obstacles such as discriminatory treatment, unfair streaming, lack of extra-curricular programs, and harsh disciplinary action, all of which discourage continuing education;
- Racial and cultural discrimination;
- Immigration hardships;
- Criminal justice mistreatment such as unfair police detentions, targeting, or searches; difficulty getting bail and overly onerous bail conditions that result in breaches; harsh sentences and jail conditions.

[102] While I contend that judicial notice can be taken of much of this, the sentencing process is enhanced by having that information readily available to the judge. In addition, it can serve a significant educative purpose for those involved and the public in general.

[103] Sentencing is about judging a fellow human being. The more a sentencing judge truly knows about the offender, the more exact and proportionate the sentence can be. Sometimes that should go far beyond the personal background of the offender. Sometimes it should include a broad swath of relevant historical, social, and cultural knowledge. An IRCA gives the judge an opportunity to learn about how this relates to the offender. A sentence imposed based upon a complex and in-depth knowledge of the person before the court, as they are situated in the past and present reality of their lived experience, will look very different from a sentence imposed upon a cardboard cut-out of an "offender".

[104] That said, the task of sentencing cannot be delegated to others like Mr. Wright. It does not affect the demand of the law that a person is held accountable for their crimes. I can only agree with Campbell J.'s thoughtful characterization in *Gabriel* of an IRCA or a cultural assessment at para. 56:

> The Cultural Assessment is not a single simple answer to a complicated question. It does not suggest that Kale Gabriel was destined by his race or his circumstances to find himself here. Like the *Gladue* report it provides important context and raises as many questions as it answers…... Like a *Gladue* report it might prompt the consideration of restorative justice options where those are appropriate. It doesn't position the offender as helpless victim of historical circumstances.

4. Application of the Information to the Sentencing of African Canadians

[105] So what is a sentencing judge to do with the information brought to the table by taking judicial notice of the systemic and background factors and the case-specific information in the IRCA or some other source? *Gladue* at paras. 68-69 illustrates why systemic and background factors can play a significant role in the sentencing of African Canadian persons. It can explain in part the incidence of crime and recidivism for offenders.

[106] *Gladue* expressly recognizes that consideration of such factors are not just limited to sentencing Indigenous persons. The effects of systemic and direct discrimination that have led to poor social and economic conditions have also been studied and verified for African Canadians. They too have led to the disproportionate incarceration of African Canadians. Thus, they are important considerations when sentencing African Canadians. I agree with Campbell J.'s comments made in *Gabriel* at para. 51:

> Some of the principles from *Gladue* are applicable to a racial and cultural group that has been the subject of such notorious centuries long systemic discrimination. It is important to know about the systemic and background factors that bring any person before the court for sentencing. That is particularly so when they relate to members of a group that is disproportionately represented in the prison population, disproportionately economically disadvantaged, disproportionately disadvantaged in education, and disproportionately disadvantaged in health outcomes.

[107] One way in which this information can be used is to ensure that the contextual circumstances regarding the lived experiences of African Canadians are properly taken into account when applying the principles of sentencing. As LeBel J. said in *Ipeelee* at para. 67:

> [J]udges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing. Professor Quigley aptly describes how this occurs:
>
> > Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination. [Citation omitted].
>
> Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination.

[108] I see no reason why the same reasoning cannot apply to African Canadian offenders. The same socio-economic factors that affect African Canadians can lead to inadvertent discrimination in sentencing. This supports why non-custodial alternatives should be considered. This is why careful, culturally appropriate, and sensitive assessments are a must in analyzing and applying the sentencing principles to an African Canadian offender.

[109] Another way in which such factors may affect sentencing is that it may bear on the moral culpability of the offender. In *Ipeelee* this rationale was cast in this way (at para. 73):

> First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in *Wells* where Iacobucci J. described these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely - if ever - attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.

[110] Likewise, I see no reason why the same cannot apply to African Canadians. Where such factors have played a role, a sentencing judge must take them into account. That much was agreed to by the courts in *Hamilton* and *Borde*. Although there are limits to this type of approach. Doherty J.A. confirmed its appropriateness when he said at para. 141:

> There is nothing unique or new in the approach to sentencing outlined above. Trial judges have always entertained submissions to the effect that an offender is basically a good person whose crime is the product of a combination of circumstances, some of which are beyond the offender's control or responsibility. Put in the language of proportionality, these arguments are directed at lessening the personal culpability of the individual offender. If the trial judge accepts such arguments, the sentence imposed will be less onerous than it would have been but for those arguments.

[111] Another point I wish to address deals with the link that needs to be shown between the systemic and background factors and the specific circumstances of the offender. I acknowledge that a connection must be demonstrated between the institutional racial inequality in general and the circumstances of the African Canadian person who is being sentenced. I appreciate in *Hamilton* that Doherty J.A. commented that the evidence of difficult socio-economic circumstances of the offender had to be a “direct” result of systemic racial and gender bias. However, I do not interpret that as a rigid requirement that the offender show a direct causal connection. Seldom can such a direct causal connection ever be proven, in life or in law. It should not be required in sentencing where the balancing of numerous, often competing factors, is more an art than a science. Such an approach has been rejected in the *Gladue* analysis. Most recently the Court of Appeal in *R. v. F.L.*, 2018 ONCA 83 (CanLII), [2018] O.J. No. 482, at para. 46 agreed with the following quote from the Saskatchewan Court of Appeal:

> The link between systemic or background factors and moral culpability for an offence does not require a detailed chain of causative reasoning. Instead, the analysis is based on inferences drawn from the evidence based on the wisdom and experience of the sentencing judge ... In applying this approach, sentencing courts must pay careful attention to the complex harms that colonisation and discrimination have inflicted on Aboriginal peoples.

[112] Similarly, I find it makes little sense to require such a direct causal connection for African Canadians. Indeed, I would go as far as to say such a requirement would simply impose a systemic barrier that would only perpetuate inequality for African Canadians.

[113] Lastly, I find there is one piece of the *Gladue* analysis that does not easily find an equivalent home in sentencing African Canadian offenders. It was recognized that for many if not most Indigenous offenders, the Canadian concepts of criminal sentencing may be inappropriate because they do not respond to the needs, experiences and perspectives of Indigenous persons. Indigenous communities often have fundamentally different world views from non-Indigenous communities with respect to the content of justice and how to achieve it. Thus, in order to achieve the objectives of sentencing, a judge may have to consider different or alternative sanctions in order to achieve them for an Indigenous person. For instance, healing lodges, sentencing circles, and spiritual practices may be suitable for Indigenous offenders as appropriate alternative measures. In their case, they may be more effective than imprisonment in meeting the objectives of sentencing.

[114] The evidence presented to me does not suggest a culturally specific conceptualization of justice held by African Canadians as a group, or any other group to which Mr. Jackson belongs. While I do not foreclose the possibility that similar alternative sanctions may also be appropriate in the right case for African Canadian offenders, I cannot make that determination based on the materials presented to me.[14]

[115] Let me conclude this part of my decision. In criminal law, whether Indigenous or non-Indigenous, there is no discount simply because of your ethnicity or the color of your skin. For the Indigenous person, the sentencing judge is required to pay particular attention to the circumstances of an Indigenous offender in order to achieve a truly fit and proper sentence. However, this is really another illustration, albeit a very special one, of the individualization of sentencing. That has always been the fundamental duty of a sentencing judge in sentencing anyone. Thus, I ask rhetorically what is wrong in paying particular attention to the circumstances of the African Canadian offender to achieve a truly proportionate sentence. The answer is self-evident. Nothing.

J. APPLICATION OF THE FRAMEWORK TO MR. JACKSON

[116] Mr. Jackson. I return to the question of your sentence. You strike me as a smart man. I heard you speak and you speak well. But I know you don’t have much education. Some of what I have said up to now was meant for other judges and lawyers. Now I will speak directly to you.

[117] Let me start at the beginning. Why do judges sentence those who commit crime? The core reason is that judges must protect the people in our community. This will make people respect the law. So that all of us can live safely, peacefully, and justly.

[118] I have to consider many rules of sentencing. The bottom line is my sentence must be fair and balanced given the seriousness of the offence and how responsible you are for it.

[119] I have set out how I should approach your sentencing. As a Black man who comes before me. In this process, I recognize the history of Black people in this country. It is a history of enslavement, segregation, and struggle.

[120] I accept that this history has touched your life. It has shaped your family's history in this country. It has shaped your own experience in this society. I know that you have personally experienced prejudice based on the colour of your skin. In short, you have suffered from racism because you are a Black man. Of this I have no doubt.

[121] This is not right. This has never been right.

[122] Discrimination and racism are but pieces in a sentencing. Sometimes, they are not very important. Sometimes, they can be very important in creating the overall picture.

[123] In your case, I have been given Mr. Wright's helpful report. He explains the why. That puts together the pieces for me. His report helps me see how your experiences with racism and socio-economic disadvantage in your community may have affected your conduct. Your choices. Your current and past contact with the criminal justice system. It helps me to better reason between the general rules I must apply, to your specific case.

[124] Mr. Wright points to four major reasons why your life has taken the direction it has. Why it has brought you before me today.

[125] The first is your racial identity. You have struggled with it. You spent some important years growing up in Cole Harbour. Especially in your teen-aged years. It is not lost on me that you started committing your crimes while still a youth. Your criminal record shows that. Cole Harbour high school was plagued with racial tension. Also, historically, African Canadian students have not done well in learning. Mr. Wright quotes from a report of the Black Learners Advisory Committee. They said this:

> African Canadian culture is often relegated to an inferior status by schools thus hiding our group's true historic struggle for survival, liberation, and enhancement…the suppression, destruction, distortion of a group's history and culture by others, and the surrender of one's own culture results in low self-esteem.

[126] This problem in schools cannot be divorced from the racism in Nova Scotian society. Generations after generations of Black people have had to deal with that racism. I recognize it. No one has to prove this in court.

[127] This factor is tied into your own development as a child and then a young man. I accept what Mr. Wright writes about it. How this racism and your own struggle as a light-skinned Black child affected you. Mr. Wright writes:

> This kind of community and ethnic tension promoted the need for youth to develop close affiliations with their peers. Though I would not characterize this as gang behavior, there certainly is a strong sense of community among peers that individual students are pressured to adopt for social and safety reasons…[Mr. Jackson] describes the years that he lived in Cole Harbor as difficult even during his early years. He struggled to fit in among his peers. Clearly an ANS [African Nova Scotian], he was often too Black to be accepted among his white peers, but among his Black peers he was too white to be Black, and forced to constantly prove himself to belong. Unfortunately, proving oneself to be

> "Black enough" even today among inner city children and those living in environments where racial tensions exist, involves dares and behavior that proves toughness and a disregard for rules.

[128] This led to certain things. I have no doubt that this in part led to your having bad influences and bad friends. As your Uncle describes it. It also led to your reconnecting with them in the few months when you were released from prison and came to Toronto. As Mr. Wright describes it. This was just before you sought out this gun that I am sentencing you for.

[129] It also meant that you did not receive very good schooling. This in turn has led to some other things. Including your not having much money. Not really having much chance to make good money. I can also see what happened from that. Early trouble with the law. Then more and more trouble with the law. Both by turning your back on school and by being friends with people that only led you astray. Mr. Wright says you have sought out role models to follow, role models that have not always been good ones. I can see why this came to be. Wise people often say it all starts when you are a child. You are an example of why this saying has much truth behind it.

[130] Did the fact you are a Black man living in the world you lived in, matter in who you have become? Yes. Of course. If you were not Black, your experience would have been different.

[131] I also get it that being light-skinned you may have suffered from your own Black friends and peers. Not just from white people. But that is the product of the kind of society we live in. Where the shade or color of your skin makes a difference in how you are treated. Those Black people who may have thought you were too white, lived in this world of intolerance. That is likely why you were treated that way. Even this has its roots in the racist world we live in.

[132] I cannot predict what path your life would have taken if you were not who you are. A Black youth growing up in Nova Scotia and Ontario. But the connections between these experiences and how you have come before me seems clear. The following words seems right to quote at this point. I think they apply to you Mr. Jackson. They were written by the former Chief Justice of Ontario, the Honourable Roy McMurtry, and a Jamaican born Canadian politician, Dr. Alvin Curling, in *The Review of the Roots of Youth Violence* (Toronto: Queen's Printer for Ontario, 2008), Vol. 1, page 42:

> Racism strikes at the core of self-identity, eats away the heart and casts a shadow on the soul. It is cruel and hurtful and alienating. It makes real all doubts about getting a fair chance in this society. Whether seen as a barrier or a hurdle, it is a serious obstacle imposed for a reason the victim has no control over, and can do nothing about.

[133] The second factor Mr. Wright mentions is the absence of your father. He was in the military. He was often away from home. This was also at a time when your mother became sick. Mr. Wright refers to studies about how absent fathers can be bad for African-American boys. Increased risk of drugs, bad behavior, anti-social friends, poor school grades, etc. This is especially so when there is no healthy and capable parent like a mother at home. Mr. Wright says this too made you vulnerable to seeking the attention from your male friends. Your need for a Black role model.

[134] As I thought about this, I was not sure that your father's absence had anything to do with discrimination or racism. You see, Mr. Wright did not get a chance to speak to your father. I do not know about your father's history and his lived experience. I do not know what made him go into the military. Or his experiences in the military. I do not know if he or his parents suffered from any trauma related to racism. Trauma that could have shaped their lives. And through it, be passed onto you.

[135] I know that it is important to know. To uncover the full picture. But I cannot guess about these things.

[136] What I do know from Mr. Wright is how your father not being around affected you. As a Black youth growing up to be a Black man. This is what Mr. Wright said:

> [Mr. Jackson's] need for a parental figure is combined with his need for male racial models. The absence of clear, pro-social male models has left a vacuum and a lack of education that has been filled and twisted with a Black, male identity that is criminal. I have written elsewhere about racial identity development of persons of African descent…The four critical issues of racial identity development that I identified from birth to adolescence include: Comfort with visible racial differences, understanding of personal equality and competence, ability to appropriately negotiate racial dynamics, and personal choices in context of race. It can be argued that Mr. Jackson has not successfully resolved any of these issues. Instead he remains uncomfortable with his racial identity as a light-skinned brother, struggles with self-esteem and confidence, is unable to resolve and pro-socially engage in racial conflict, and makes personal choices based on beliefs about what it is to be a Black man.

[137] Mr. Wright goes on and says that though hesitant at first, you opened up and gained some insight into this. That leaves me hopeful.

[138] The third thing Mr. Wright talks about is your mother's mental illness. She began hearing things. Believing herself to be a prophet. Receiving messages from God. It was like she suffered from delusions. I know it hurt your family. It hurt you. Also, the Church your mother was involved in did not give her the help she needed. Indeed, they may have made her worse. Again, your mother, Mr. Jackson, did not provide information to Mr. Wright. I think your family wanted to protect her.

[139] And this, too, may have connected to the bigger issues of race or discrimination. Mr. Wright pointed out studies that showed people of African descent are treated worse and helped less than white people when they are sick. Your mother's illness and the way she was treated may have been related to discrimination. Like with your father, though, I cannot say for sure.

[140] Finally, Mr. Wright believes based upon the information he had, that you grew up kind of poor. This was the final thing he thinks is important in your case.

[141] Mr. Wright ends this way:

> So, Mr. Jackson's path is complex and tragic. A light-skinned African Nova Scotian with an absent father and a mentally ill mother, his psycho-social and racial identity development was impaired from his earliest years. He grew up with low self-esteem, insecure in his racial identity. During his teen years as he should have been developing a stronger sense of who [he] is through pro-social activities with his peers and under the watchful gaze of his parents, his father was away and his mother was becoming ill and he was drawn into being her caregiver, sometimes in dramatic circumstances. He sought the acceptance of Black male friends without the confidence and social skills to find that acceptance among pro-social peers. He instead, out of the emotional confusion of his childhood, and the opportunities available to himself as a poor Black kid living in low income neighborhoods, sought his acceptance through association with criminal peers. And though he was identified early as youth with such problems, attended public

> schools and was a frequent resident in juvenile and adult institutions, he did not find educators, mental health workers, social service workers, or corrections professionals who were able to competently identify and treat these complex needs.

[142] So as I see it, these things are things I should think about in your sentencing. It started when you were young. That youth record quickly turned into an adult criminal record. That record is pretty bad. But I recognize it started when you were young. And your sentences were pretty tough right from the start.

[143] The problem of the over-jailing of African Canadians starts with young people. How they come into the criminal justice system. How we treat them. The Honourable Roy McMurtry and Dr. Curling connected racism to an over-representation of young Blacks in the criminal justice system:

> "…it is apparent to us that all of the immediate risk factors for violence involving youth can easily arise from the diminished sense of worth that results from being subject to racism, and from the often accurate inference of what that racism means for the hopes of advancing, prospering and having a fair chance in our society. When, as is so often the case, racism is combined with poverty and other sources of serious disadvantage…its central role in the issue that concerns us is all too evident."

[144] I find this applies to you.

[145] So what does all this mean today? You are not a child anymore. You are a man. An man with a serious criminal history.

[146] First of all, I have a better understanding of how you have come before me today. I have a better understanding of who you are. That may sound hollow. But I believe it is important.

[147] Secondly, I can put your criminal record into some context. The social setting and personal circumstances you grew up in. In other words, it lets me get past a simplistic picture of you. As "a bad kid and now a bad man." I see the path you have taken. I see it shaped by forces of racism and intolerance. Not saying that you could not have made better choices when you were young. I am saying those choices were limited. By your family situation. And by the fact you were a young *Black* man.

[148] So I have a fuller picture of what this criminal record means. I have a more 3-D view of you. Mr. Wright describes it like this: "Mr. Jackson's personal history of early racial conflict, identity confusion and family disruption created the conditions for him to slide easily into the path that history had already well paved for him."

[149] Thirdly, I find that this information makes me think whatever my sentence is, it should not simply write you off. As a criminal not worth the time to help be better. There is a better way to get to your sentence. This is the value of the approach to sentencing that I have talked about in this decision.

[150] Now Mr. Jackson, your case is not about whether you go to jail or not. May be a different case will be about more creative sentences. A sentence that does not send an African Canadian offender to jail. But does something else. Something like community healing. What we call restorative justice. Your case is not that case. Your case has have moved far beyond that. We all agree that your case calls for more jail. Sometimes the law gives me not a lot of tools. Jail is the only tool I have today. The key question is how much jail.

[151] I must consider factors that make your crime more serious. I must also consider factors that should lessen your sentence.

[152] There are a number of aggravating factors. That make your crime more serious. The facts are that you deliberately looked for this gun. This is not a case where you found yourself storing a gun for someone else. Or the gun was just found where you lived. The police investigation showed that you made serious attempts to find one. And you did it. Successfully. Quickly. I know though that there is no evidence that you were about to use it in a crime. That would be even more serious. But your crime is on the more serious end of these kinds of crime. It is not on the less serious end.

[153] Also serious was that there was one bullet in the chamber. It was ready to be fired. The bullet was not just in your pocket. It was in the gun.

[154] Also bad is that you had the gun in a public place. It was in your waistband. Carrying a gun in a public place is dangerous. Dangerous to other innocent people just walking by. Dangerous because if you got involved in something unexpected like an argument or a fight, there you were, with a loaded gun. These facts make your crime more serious. More serious than if the gun was possessed in a way, less dangerous.

[155] There is then your breach of the prohibition order. It goes without saying that the fact you were on multiple court orders prohibiting you from possessing a gun is serious. It shows you have no respect for court orders.

[156] There is finally your criminal record. It is long and serious. It is also related to the crimes I am to sentence you for. The last sentence you served for robberies totaled 81 months. There were guns involved in them. I will have more to say about this. But let there be no question. Your criminal record is a serious aggravating factor.

[157] Let me turn to the mitigating factors. Things that work in your favour. You have pleaded guilty. You have shown you are sorry for what you did. I also accept that you are sincere based on the full picture that I have. I understand that your preliminary inquiry was only a short one. You did not challenge being ordered to stand trial. Also, I understand that you had wanted to plead guilty immediately after your preliminary inquiry was finished. But things did not turn out that way.

[158] I also have a full picture of who you are. Where you have come from. I say where you come from literally. A black community in Nova Scotia. But also where you come from symbolically. I accept as mitigating the challenging circumstances that you faced while you were growing up. Also in your favour is the fact that despite your record and long stints in jail, you have not lost all your social supports. There were people who wrote letters for you. There were people for you in court. Back on March 26 and 27.

[159] These are things I must think about. But sentencing is not a grocery list of factors. It is a very different from case to case. And this case is about you Mr. Jackson. A sentencing is about a careful balancing of these factors. A careful balancing of the sentencing principles I must apply to your case. This balancing is guided by the law I must follow.

[160] Let me turn to that balancing now. I will tell you my decision.

[161] I was given a lot of cases Mr. Jackson. One important principle of sentencing is that your punishment should not be that different from others in a similar situation. I have paid attention to those cases. Some judges go through such cases in detail. I myself have done so in other cases. I am not going

to do so in your case. It does little to explain to you my sentence. But those cases are important. And I have thought about them. But the law also recognizes these cases are guidelines.

[162] Let me turn to some hard realities Mr. Jackson. You committed a gun crime. Guns are dangerous. Guns are designed to kill. Your gun was illegal. And it was loaded with one bullet. I do not need quote from the many decisions that emphasize how serious we treat these offences. My sentence must deter you. Deter others from doing the same thing. And denounce this crime. The law states that this must be the primary focus of my decision. That is why tough sentences are called for. Our community must be protected from gun crime. Our community rightfully demands that sentences make it clear as a bell that gun crimes will not be tolerated.

[163] Your crime is therefore serious. Yet like most things, it is not black or white. Seriousness comes in shades. I recognize that there is no proof that you were going to use that gun to commit a crime. You mentioned when you had a chance to address me that there were reasons why you sought out a gun. I sensed fear or a desire to protect yourself as a motive. But you did not want to talk about it. I understand. But I can only go on the evidence. The best I can say is that the seriousness of this offence is not made worse by any evidence you were committing other crimes like drug trafficking or robberies.

[164] In your case, Mr. Jackson, I also must be concerned about deterring you. You have committed gun crimes in the past. In the course of robbing a gas station and convenience stores. I will say this about these convictions. I have the transcripts of the sentencing done by the judges in those robberies. I do note that the judges did not have the benefit of the kind of information that I have been given. I do not want to be critical but very little information was given to the sentencing judges. They were also not asked to look at the disproportionate over-incarceration of African Canadians. They were not asked about how systemic discrimination related to you or your offences. I know more about you. A whole lot more. I also know how the systemic and background factors played out in your crimes. This puts into context how I should assess your criminal record. How I should assess the sentences given in the past by those judges.

[165] The criminal record is therefore not just about you. It is not just about the wrong choices you made. Choices that hurt and harmed others. That record was also influenced by forces in society. Forces that had bad effects upon you. The effects of discrimination, over generations, are not easy to uncover or track. But those effects can be very real. Mr. Wright's report has tried to flesh this out. While this is not an excuse for your past actions, I can see how those influences are relevant in assessing your past history. In my view, this puts into context that serious criminal record. It somewhat lessens your culpability for those past criminal offences. At the end of the day, maybe not a lot. But at the very least, it contextualizes it.

[166] This then speaks to the need to increase the punishment for these offences here. In 2008 for three robberies, including pre-trial custody, you got about 7.5 years in jail. No doubt Mr. Jackson you know that when somebody does more and similar offences, the sentences usually goes up. Rather than down. But here I find that that this principle has less force. Firstly, these offences before me are not the same as the robberies. Even if my sentence must include a message to you, to deter you, the sentence imposed need not be higher than your last series of punishments. This is because those crimes were much more serious. And there were three of them. Secondly, I have more information about you. Important information that allows me to more fully understand what brought you here on these crimes. Finally, imprisonment has not always treated African Canadians well. The studies show this. I know from the materials relating to you specifically, jail was not a good influence.

[167] Another way the systemic and background information is important is when I think about rehabilitation. This means the chances of you becoming a better person. A law abiding person. A person who will be a good and productive person when living back in the community.

[168] While the Crown does not argue it, I can see why many might say rehabilitation is not important to think about for you. Why many might say you cannot be rehabilitated. It could be argued that whatever Mr. Wright says about your childhood, you are now a man of 33 years of age.

[169] But this is why in my opinion, the information in the IRCA helps. It helps me to conclude that rehabilitation remains important. As a worthwhile sentencing principle, it should not simply be thrown into the garbage in the balancing I must do. It leads me to conclude that you are not the hardened criminal that others may conclude based upon only a caricature of who you are.

[170] I see the path that have lead you here. The road you took was not helped by being Black in a white world. More importantly, based upon the information from Mr. Wright and others, there is still hope for you. I include yourself in that Mr. Jackson. You still have hope for yourself. You still have the ability to learn from your past mistakes. I am not saying that you have shown yourself to have done so. I am just saying you still have the ability to do so. Put another way, Mr. Jackson, I am enough of a realist to recognize real rehabilitation, shown by actions not just words, is not going to be easy for you. But I have been given enough information to accept that it still remains a real possibility.

[171] You still need time to deal with the issues Mr. Wright mentions. He says you are just beginning to understand what is in your past. How that is affecting your present. In the meantime, people need to be protected from you. This is why my sentence must separate you from the community. That means, sadly, that you will be separated from those who support and care for you. Who would welcome you back sooner rather than later. But it is necessary.

[172] This brings me back to the principle of restraint. I am told in the case of *Ipeelee* it must apply to the length of the sentence. It is a measure of our own humanity how we punish those who violate our laws. The principle of restraint operates so that our sentences are not excessive. It operates to remind ourselves of our own humanity when we punish. Properly understood, it only enhances the respect for the administration of justice.

[173] When I apply the principle of restraint in the broader context that I have already spoken at some length about, I find that the Crown position to be too much. It does not give enough attention to the contextualization of your criminal record. Not enough to the background factors that brought you to court. Not enough for a proper understanding of the seriousness of your offences. It ignores the potential for rehabilitation. It gives too much attention to deterrence and denunciation. Attention that is not necessary to meet the goals of sentencing.

[174] I further find that even though your lawyers have provided much information and have persuaded me I should approach your sentencing in the way that I have, 4 years is too low. It is not in keeping with the law that I must obey. Even looked at in context, it ignores the seriousness of your prior criminal history. Finally, it does not recognize how seriously we must treat gun crimes.

[175] When I do my very best in making sure that your sentence is a proportionate one, after taking into account all that I must, I find that a total sentence of 6 years to be a fit and just sentence for you and for your crimes. A sentence of 5 years for possession of a prohibited firearm with ammunition and a 1 year consecutive sentence for the breach of a prohibition order. I feel that this is right for all the reasons I have given.

[176] This is not a race-based discount. Rather it is a fit sentence when all the circumstances are taken into account, including historical and systemic factors. It is a just sentence that recognizes that each sentence is individual based upon well-recognized principles of law. But also one that takes into account

the long-standing and pressing problem of disproportionate incarceration of African Canadians. It is a sentence that best applies the restraint principle.

[177] Mr. Jackson, you have done 802 days of pre-trial custody. The Crown and your lawyer agree that I should give credit for that time on a 1 to 1:5 basis as allowed for in the *Criminal Code*. I also agree for the reasons the law says, I should give you that added credit. Therefore, you will be credited 1,203 days for your pre-trial custody. I will credit that time to your sentence of 5 years for the possession of a prohibited firearm with ammunition. Thus, your sentence for that offence is 1 year 257 days (802 days pre-trial custody at 1.5 credit). There will be a 1 year consecutive jail sentence for the breach of a prohibition order. The total sentence you will serve in jail is therefore 2 years 257 days.

[178] There will also be a DNA order and a s. 109 order for life.

[179] Mr. Jackson, let me leave you with these final words. I am not Black. I cannot but see the world except through my own eyes.

[180] But as a judge who must pass judgment on my fellow humans, I am reminded of the novel "To Kill a Mockingbird." Written some time ago. Set in the Deep South of the United States. In it, a lawyer is appointed to represent a young Black man accused of a very serious crime. The book is about racial injustice and a loss of innocence. In the story, this lawyer gives his young daughter some very important advice. He tells her that in order to really get to know someone you are judging, you must put yourselves in the shoes of that person. And stand a while in them.

[181] I believe that no better advice can be taken to heart by a sentencing judge.

JUSTICE S. NAKATSURU

Released: April 23, 2018

CITATION: R. v. Jackson, 2018 ONSC 2527
COURT FILE NO.: CR-17-10000505
DATE: 20180423

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

– and –

JAMAAL JACKSON

Defendant

REASONS FOR SENTENCE

JUSTICE S. NAKATSURU

Released: April 23, 2018

[1] Mr. Jackson is a Canadian of African heritage. While Mr. Jackson stated he had Indigenous heritage as well, Mr. Jackson waived the application of *Gladue* principles in his sentencing. Mr. Jackson has referred to himself as a Black. I appreciate the importance of language and I respect his choice of describing his racial identity. Thus, I will henceforth refer to him as Black although I may refer at times in my decision to others as African Canadian. In doing so, I fully appreciate that an African Canadian's immediate country of origin may be from a nation outside of Africa (ie. the Caribbean).

[2] The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2015-2016*, at 55-56.
[3] The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2014-2015*, at 2.
[4] The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2015-2016*, at 2.

[5]The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2014-2015* at 2.
[6] The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2012-2013* at 3.
[7] The Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2014-2015* at 2, 27 and 30. See also *Annual Report 2013-2014*, at 2; *Annual Report 2015-2016* at 8, 61-62; *Annual Report 2016-2017*, at 55.
[8] African Canadian Legal Clinic, *Civil and Political Wrongs: The Growing Gap Between International Civil and Political Rights and African Canadian,* p. 12.
[9] *Ibid* at 18.
[10] *Ibid* at 12.

[11] The report uses the term "Black" to denote those inmates who voluntarily self-identified as "Black" during the CSC intake process. Some inmates of African descent may not have been included by virtue of a geographic self-identification such as "Caribbean".

[12] Marcel Trudel, Canada's Forgotten Slaves: Two Hundred Years of Bondage (Montreal: Vehicle Press, 2013) at 254-271.

[13] See A. Hebert, Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice", (2017) 43:1 Queen's L.J. 149-174 which provides a useful summary of the disparate approaches to Gladue reports across jurisdictions.

[14] While I conclude this on the evidence before me, I do recognize that for some African Canadian communities, such as those that exist in Nova Scotia, there may be embedded restorative justice principles in their own justice practices and traditions: see M. Williams, *African Nova Scotian Restorative Justice: A Change Has Gotta Come* at 436-38.