CITATION: R. v. [redacted] 2013 ONSC 3321
COURT FILE NO.: 12-40000535-0000
DATE: 20130627

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
HER MAJESTY THE QUEEN	*Anna Stanford*, for the Crown
- and -	
[redacted] and [redacted]	*Andrew Stastny*, for the Defendant, [redacted]
	John Scandiffio and *Marsha Kideckel*, for the Defendant, [redacted]
	HEARD: June 19, 2013

SPIES J. (orally)

REASONS FOR SENTENCE

Overview

[1] On April 23, 2013, following a trial before me, I found [redacted] and [redacted] guilty of robbing and unlawfully confining [redacted] and [redacted] contrary to sections 344(1)(b) and 279(2) of the *Criminal Code*. I also found Mr. [redacted] guilty of uttering threats to Ms. [redacted] to cause death to her, contrary to section 264.1 of the *Criminal Code*. The defendants are now before me for sentencing.

The Facts

Circumstances of the Offences

[2] The circumstances of the offences are set out in my reasons for judgment; *R. v.* [redacted], 2013 ONSC 2349. In summary, Mr. [redacted] and Mr. [redacted] participated in a home invasion style robbery of Ms. [redacted] and her former boyfriend, Mr. [redacted], which took place in Ms. [redacted] home at [redacted], in the City of Toronto on March 18, 2012, a little after 5 p.m. Ms. [redacted] was in her kitchen cooking dinner. Her four year old son was sleeping in the living room where her three year old daughter and Mr. [redacted] were watching television. Ms. [redacted] responded to a knock at the front door and opened when the person at the door identified himself as [redacted]. This is how Ms. [redacted] knew Mr. [redacted]. When she opened the door Mr. [redacted] and three other men pushed their way into the house. The other men were known to Ms. [redacted] as [redacted], whom I found to be Mr. [redacted], [redacted]. Ms. Peters was pushed out of the way and by this time Mr. [redacted], [redacted] had pulled out guns. Although the guns were not pointed directly at anyone at this time, they were held in a position to shoot and Ms. [redacted] believed them to be real. There was no dispute that Mr. [redacted] was not armed nor was there any evidence of other weapons.

[3] At trial the Crown alleged that these firearms were real, but I was not satisfied of this and so will proceed for sentencing on the basis that the firearms in the possession of Mr. [redacted] were imitation firearms.

[4] The [redacted] appears to have been motivated at least in part by the fact that Mr. [redacted] was selling marijuana from Ms. [redacted] home. Once inside the home, Mr. [redacted] slapped Mr. [redacted] in the face and told him that he could not "hustle on our block". Mr. [redacted] ordered Ms. [redacted] and Mr. [redacted] into the living room. At this time Mr. [redacted] and [redacted] were going through Ms. [redacted] handbag and the cupboards in the kitchen. Mr. [redacted] and [redacted] then ordered Ms. [redacted] and Mr. [redacted] into the basement. Her daughter was crying and Ms. [redacted] told Mr. [redacted] that she was not going to the basement. [redacted] then pointed his gun towards her daughter and told her to "shut the fuck up". Ms. [redacted] testified that her son slept through the robbery. She did not suggest that any of the men tried to get him up or that they spoke to him.

[5] Mr. [redacted] and [redacted] brought Ms. [redacted] to the basement and Ms. [redacted] believed [redacted] was in the basement at this point too. Ms. [redacted] did not go to the basement as directed. Mr. [redacted] remained in the kitchen, rummaging through the cupboards. Ms. [redacted] then picked up her daughter and ran out of the house. She was forced to leave her son behind who was still sleeping. As she left the house she said she was going to call police. No one tried to stop her. The men had been in her house about five minutes by this time. She ran to a neighbour's home and called 911.

[6] Ms. [redacted] did not see the men leave her house but while she was on the phone with the 911 operator she saw them running away. She started yelling at them to bring back her phone.

Ms. [redacted] was concerned about her phone because her mother had just had a stroke and her phone was the only way her mother could call her.

[7] Surveillance video shows the defendants and the other two young men talking together outside, east of Ms. [redacted] townhouse building, just before the robbery. Given the timing they must have been discussing the planned robbery. The fact they were all wearing gloves during the robbery, in addition to the presence of the imitation firearms, suggests they had already made some plans to rob Ms. [redacted] before this meeting.

[8] The defendants and the others took Mr. [redacted] wallet which had all of Ms. [redacted] and her children's identification in it, her cell phone, Mr. Osman's cell phone, her kitchen scale and her camera. Photographs taken by the Scenes of Crime Officer show kitchen cupboard doors open and cushions on the couch in the living room on end, consistent with the rooms being ransacked, but there was no evidence of damage to the home or its contents.

[9] After the robbery, I found that Mr. [redacted] called Mr. [redacted] telephone and spoke to Ms. [redacted] and that he uttered threats to Ms. [redacted] when she answered. He stated on the phone: "you fucking rat – don't come to [redacted] short form for the [redacted] a reference to [redacted] – I'm going to fly you". Ms. [redacted] testified that the statement "I'm going to fly you" meant to her that he was going to kill her or do harm to her.

[10] Mr. [redacted] was arrested on March 20th, 2012. Although he was observed trying to avoid police by walking quickly and changing direction, he did stop and when he was asked to approach one of the arresting officers, he did so and did nothing to resist arrest.

[11] Mr. [redacted] turned himself in to police on April 2nd, 2012.

Impact on Ms. Peters, Mr. Osman and Ms. Peters' Children

[12] Ms. [redacted] was asked to provide a Victim Impact Statement but chose not to do so. D.C. MacDonald reported to the author of Mr. [redacted] Pre-Sentence Report (PSR) that Ms. [redacted] is very concerned for the safety of herself and her children if Mr. [redacted] is released into the community. The probation officer was unable to contact Ms. [redacted] for her input but this may well be why she has not provided an impact statement.

[13] Although it is not clear how seriously Ms. [redacted] considered the threats from [redacted], as she did not immediately report the threats to police, after the robbery she moved as a result of this incident and she no longer lives in the [redacted] area. Although she came to the trial to testify, I accept that she is still fearful of the defendants and the other two men who robbed her as she reported to D.C. MacDonald and the probation officer.

[14] The best evidence, however, of the impact the robbery had on Ms. [redacted] is the 911 call she made which was introduced into evidence. Ms. [redacted] sounded very hysterical on that call and could barely speak and she was crying throughout the call while the operator kept her on the

line. It was difficult to tell what she was saying for parts of the call. There is no question that the event traumatized her. Although she did yell after the men for her cell phone, which may seem illogical, given her evidence about her mother, this fact does not undermine the emotional impact of these events that is clear from her voice in this call. Similarly, she also texted Mr. [redacted] a scathing message flaunting the fact that he hadn't stolen the "stash". Again, this does not undermine the terror she felt at the time of the home invasion.

[15] Although I have no evidence of any long term impact of these events on Ms. [redacted] children, her daughter was crying at the time and was old enough to know that a gun was being pointed at her. Ms. [redacted] pointed out that during the 911 call when the operator asked Ms. [redacted] how her daughter was, she said that she was playing at the neighbour's. It is impossible to say what to take from this but common sense would suggest that she would not yet have forgotten what happened.

[16] Fortunately Ms. [redacted] son slept through the robbery but he must have been frightened when Mr. [redacted] woke him and took him outside to where police officers were arriving in marked police cars. Even the defendants have now apologized for the fact that these events occurred in the presence of small children. Furthermore, it must have been difficult for Ms. [redacted] to leave her home in these circumstances to call 911 and have to leave her son behind.

[17] Ms. [redacted] and the children were fortunately not physically injured. Mr. [redacted] refused to talk to the 911 operator or to cooperate with the police or give a statement. An officer who responded to the 911 call spoke to him and he observed that Mr. [redacted] forehead was injured and, in particular, there was a bruise. Ms. [redacted] testified that she did not observe this injury before Mr. [redacted] went to the basement. In addition, as I have already stated, Mr. [redacted] slapped Mr. [redacted] in the face.

Circumstances of [redacted]

[18] I received a PSR with respect to Mr. Brown. He was [redacted] years old at the time of the offences. He is now 23, single and has no dependents. He was born in Toronto and reported a stable childhood although he was raised only by his mother and never knew his father. He has three older half-sisters. He reported to the probation officer that he has a "strong respect" for his mother and sisters for helping him and struggling to raise him and that he feels bad that he is in jail and not able to assist his mother.

[19] Mr. [redacted] mother reported that due to financial hardship she sent her son to live with her cousin in [redacted] between the ages of three and eight when he returned to Canada and lived with her. She has been keeping in regular contact with him while he has been in jail and reports that he has promised her that he will do better upon release and not let her down.

[20] Mr. [redacted] attended a number of different high schools but repeatedly dropped out. He skipped school to smoke marijuana with his friends. He reported to the probation officer that he has about 22-23 credits of the required 30 credits to graduate from high school. His goal upon

release from custody is to finish high school. In terms of employment, Mr. [redacted] reported being a general labourer in the summer of 2011, doing construction at the Rogers Centre. He was not working or going to school prior to his arrest.

[21] This is Mr. [redacted] first conviction. Mr. [redacted] does not have any misconduct findings while in custody to the present.

[22] A character letter was filed on behalf of Mr. [redacted] by the Program Manager at the [redacted]. It confirms that Mr. [redacted] was employed as a peer leader in the [redacted] as of January 18, 2012. The letter states that they would seriously consider rehiring Mr. [redacted] as a peer leader again for these projects should the opportunity present itself. Mr. Stastny advised me that the Program Manager is aware of these convictions.

[23] Prior to his incarceration Mr. [redacted] reported to the probation officer that he used marijuana daily. He feels he needs to stop this use as he realizes that it resulted in his lack of motivation. He reports being an occasional alcohol user. Mr. [redacted] mother reported that as far as she knows there are no drug or alcohol concerns. She has never observed her son coming home impaired or intoxicated. The probation officer reports that daily marijuana use presents as problematic and that Mr. [redacted] would benefit from substance abuse educational programming.

[24] Mr. [redacted] reported to the probation officer there were certain aspects of the offence which he accepted responsibility for and he stated "I know I did wrong". He realizes that he has made poor decisions in his life for the sake of "fast money" and he reported that he is easily influenced by his friends. His mother reported him as a follower and not a leader and that he was doing fine until he got caught up with the "wrong company".

[25] Mr. [redacted] told the probation officer that he has learned his lesson. He is prepared to make better choices in the future. The probation officer stated in the PSR that Mr. [redacted] presented as sincere and appears to have the potential to improve his life in a very positive manner.

[26] Mr. [redacted] made a statement to the court which impressed me as sincere. He apologized to all parties for his actions; particularly to Ms. [redacted] children. He seems to appreciate the impact that his actions and the actions of the others may have had on them. He recognizes that he has let down the [redacted] community by failing to be a role model to the children there and by directing them down the "wrong path". He notes as well the pain and suffering that he has caused his mother. Mr. [redacted] stated that he takes full responsibility for his actions and that as a result of the time he has spent incarcerated, he has changed for the better.

Circumstances of [redacted]

[27] A PSR was also prepared for Mr. Hersi. He was [redacted] years old at the time of the robbery. Mr. Hersi is single and does not have any children. He says he has a girlfriend and that he is looking forward to having children in the near future.

[28] Mr. [redacted] was born in Toronto and grew up in the [redacted] area until the end of 2010 when he moved to the [redacted] area which is about a fifteen minute drive away. This is where he was living at the time of his arrest. At the time he had a cousin who lived in [redacted] that he visited two to three times a week and an aunt that lived at [redacted], which is also in the area.

[29] [redacted] parents immigrated to Canada in 1990 from Somalia. His mother told the probation officer that her husband is currently in Somalia on a business trip and she is employed as a school bus driver. When her husband is in Toronto he is employed as a taxi cab operator.

[30] Mr. [redacted] told the probation officer that his formative years were difficult. His family initially resided in the [redacted] public housing development and he described his family's time in this area as "rough". He often got into fights in the neighbourhood and many of his friends and associates were in similar situations.

[31] Mr. [redacted] reported that for the most part he has a positive relationship with all his family members. He has four siblings. He described his mother as a strongly religious woman who works very hard to provide and care for the family especially in his father's absences. His mother has very strict rules regarding alcohol and smoking in the family home citing the family's strict Muslim religious beliefs.

[32] Mr. Hersi completed Grade 9. He has some Grade 10 courses but did not complete any further credits in Canada as he left the country. He worked for a brief period at McDonald's while attending high school. Shortly before these events he was employed at a bakery in Toronto via a temporary employment agency. He does not have any specialized training or skills.

[33] Mr. [redacted] has a criminal record as follows:

- August 13, 2011 – Mr. [redacted] was found guilty of breaching his recognizance and sentenced to seven days and five days pre-trial custody.

- December 1, 2011 – Mr. [redacted] pleaded guilty to breach of recognizance and received a suspended sentence, six days' pre-trial custody and nine months' probation. The probation officer reports that this suspended sentence required Mr. [redacted] to make reasonable efforts to find and maintain gainful employment or attend school. Ministry records indicate that he was late for every reporting session and did not appear to be interested in discussing his personal issues or opportunities to improve himself. Mr. [redacted] was subsequently arrested for the drug offence referred to below and released on bail. When he was arrested for the offences before this court, he remained in custody for the remainder of the probation term.

- August 30, 2012 – While in custody on the charges before this court, Mr. [redacted] pleaded guilty to possession of cocaine for the purpose of trafficking. He received an additional 80 day jail sentence and one year term of probation for the offence of possession for the

purpose of trafficking. Since Mr. [redacted] has remained in custody for the present charges he has not made any progress towards the requirements of this order which expired on June 20, 2013. As the conviction and sentence for this offence was after the offences before this court were committed, it is only relevant to the question of rehabilitation and enhanced credit.

[34] Mr. [redacted] has been in custody since he was arrested on March 21, 2012. He has been housed at Maplehurst, the Toronto West Detention Centre ("TWDC"), the Toronto Jail and the Toronto East Detention Centre ("TEDC"). Mr. [redacted] has committed a number of misconducts while in custody. Between May 1, 2012 and July 16, 2012, while Mr. [redacted] was in Maplehurst, he was found guilty of committing or threatening to commit an assault on two different inmates. While he was in the TWDC, Mr. [redacted] was found guilty of the same offence on three occasions, all involving different inmates, between February 28, 2013 and March 19, 2013. More recently, while at the TEDC, Mr. [redacted] was found guilty of the same offence, again with different inmates, on two occasions, once in April and the latest on May 29, 2013. Although Mr. [redacted] has spent a considerable amount of time in the Toronto Jail, from July 23, 2012 to January 17, 2013, there is no record of any incidents there. I have no explanation for why that could be given his history of misconducts at all of the other institutions where he has been held.

[35] Mr. [redacted] told the probation officer that he initially attempted to complete a correspondence high school course but lost the provided materials. To date he has not participated in any institutional rehabilitative programs.

[36] Mr. [redacted] reported that he began drinking at the age of 16 but he does not feel that his alcohol use is a problem and he has never attended any treatment or counselling in this area. Mr. [redacted] also reported that he began using substances at the age of 16 when his friends introduced him to marijuana. He acknowledged to the probation officer that a number of his convictions are directly related to substances (which was later challenged by Ms. Kideckel) and he denied that he needed any help in this area of his life. When discussing the rehabilitation condition of the current probation order with the probation officer Mr. [redacted] stated that he was not open to attending any substance abuse programs and would "rehabilitate himself" by staying away from drugs and negative peers in the future.

[37] Mr. [redacted] mother advised the probation officer that upon his release from custody she would ask her husband to send him to Somalia where he would have more family support and hopefully that would "straighten him out".

[38] The Toronto Police indicated that Mr. [redacted] behaviour was consistent with that of an individual who was involved to some degree with a street gang. References to this were redacted from the PSR as they are beliefs only, not supported by any evidence. I have disregarded these comments.

[39] Mr. [redacted] acknowledged to the probation officer that he was at Ms. [redacted] home when the home invasion occurred, which is certainly something he denied when he testified at trial but he maintained that he was simply there to purchase weed, that he had no prior knowledge and that he had not actually participated in the incident. He said he felt sorry for the children who were in the home when the incident occurred but did not express any remorse for his behaviour simply stating that he was at the wrong place and got caught up in a situation.

[40] In the PSR the probation officer concluded that given Mr. [redacted] lack of acknowledgment and remorse for his behaviour, the potential to address this behaviour during a period of community supervision is questionable. In his brief criminal history Mr. [redacted] has presented himself with a lack of respect for court orders as evidenced by his conviction for non-compliance. The probation officer is of the opinion that Mr. [redacted] is not presently ready to benefit from a further period of community supervision. He concludes that Mr. [redacted] best interests "may best be served in a highly structured environment where he is able to reflect on his behaviour in this incident and prepare further for his return to the community."

[41] Mr. [redacted] made a statement to the court. I was not impressed with its sincerity. Notably Mr. [redacted] began his statement by saying that this was the longest time that he had been behind bars. When he is released he wants to go back to school, get a part-time job, stay in a positive role, stay away from negative influences and keep himself busy. He took no responsibility for his behaviour with respect to these offences nor did he make any apologies for it. Although this may be due to a desire to preserve his right of appeal, which is Mr. [redacted] right, I could not conclude that it constitutes an expression of remorse that should mitigate his sentence.

Legal Parameters

[42] The maximum sentence for a first offence of robbery without a firearm, pursuant to section 344(1)(b) of the *Criminal Code*, is imprisonment for life; there is no minimum sentence. The maximum sentence for unlawful confinement pursuant to section 279(2) of the *Criminal Code* is imprisonment for ten years; there is no minimum sentence. The maximum sentence for threatening pursuant to section 264.1(2)(a) is five years and again there is no minimum.

Positions of Crown and Defence

[43] Ms. Stanford submitted that Mr. [redacted] should receive a total sentence of about six years, which is based on the mid-range from *R. v. Wright*, [2006] O.J. No. 4870 (Ont.C.A.). Ms. Stanford acknowledged that although the primary goals must be denunciation and deterrence, that rehabilitation cannot be ignored, particularly for Mr. [redacted]. Ms. Stanford conceded that Mr. [redacted] should be entitled to enhanced credit at the rate of 1.5 for every day served. Since April 2, 2012 to the date of the sentencing hearing, he has spent 444 days in custody. With a credit of 1:1.5 she conceded that Mr. [redacted] is entitled to a credit of 666 days which she said was about 22.2 months, but that assumes all 30 day months. In any event, Ms. [redacted] submitted that he should be sentenced to an additional three years and ten months for an effective sentence of six years.

[44] Mr. Stastny's position on behalf of Mr. [redacted] is that he should receive a sentence close to two years. He submitted that for Mr. Brown's circumstances, given the fact he has no criminal record, given he is a youthful offender, and he had a less central role, the appropriate range of sentence is in the two to four years range.

[45] With respect to Mr. [redacted], for a number of reasons, Ms. [redacted] submitted that he should receive a stiffer sentence. She asked that he be sentenced to a global sentence of eight years; seven years for the robbery and unlawful confinement charges and one year consecutive for the threatening charge. Mr. [redacted] has spent 458 days in custody. Fifty of those days related to his drug conviction on April 30, 2012, resulting in 408 days pre-trial custody or 13.6 months; this was also calculated on the basis of 30 days per month. Ms. [redacted] submitted that Mr. [redacted] is not entitled to enhanced credit. Accordingly, Ms. Stanford requests an additional six and a half years for a global sentence of eight years.

[46] Ms. Kideckel, on behalf of [redacted], submitted that [redacted] should receive a sentence in the range of three to four years and that he should not be sent to the penitentiary.

[47] Ms. Stanford also requested a mandatory DNA order and a lifetime weapons prohibition pursuant to section 109 of the *Criminal Code* for each offender. Neither Defence counsel had any issue with the requested ancillary orders.

Case Law

[48] All counsel provided cases to me dealing with sentencing in home invasion cases in support of their respective positions. In addition Mr. Stastny provided cases dealing with the principle of restraint when sentencing youthful offenders. He also prepared a detailed sentencing chart reviewing the cases which was of much assistance.

Range of Sentence

[49] In *Wright*, Blair J.A., speaking for the court, noted at para. 13, that home invasion is a serious and increasingly prevalent crime in our society. He referred to the Court of Appeal's decision in *R. v. S.(J.)* (2006), 210 C.C.C. (3d) 296 where the court observed that home invasions are particularly troubling "because they represent a violation of the sanctity of the home and of the sense of security people feel when in their homes – highly cherished values in our society ...".

[50] Blair J.A. reviewed the range of sentence for home invasion cases and concluded, at para. 23, that the cases:

> ...reflect a gamut of sentencing dispositions in 'home invasion' cases from as low as four or five years, to as high as eleven to thirteen years – with the suggestion that even higher sentences may be reserved for situations involving kidnapping, the infliction of serious injuries, sexual assault or death. Whether a 'range' of that elasticity is of much assistance to trial judges in their efforts to preserve

> sentencing parity for similar offences involving similar offenders – apart from signaling that a significant penitentiary jail term is generally called for – is not clear to me.[1]

[51] I note that since we do not know the cases reviewed by Justice Blair, we do not know if his conclusion as to the range of sentence included cases of youthful first offenders. However, Blair J.A. did go on to say that home invasion cases call for a particularly "nuanced approach" requiring a careful examination of the circumstances of the particular case in question, the nature and severity of the criminal acts perpetrated in the course of the home invasion and the situation of the individual offender.

> Whether a case falls within the existing guidelines or range — or…whether it may be one of those exceptional cases that falls outside the range…—will depend upon the results of such an examination. … in cases of this nature the objectives of protection of the public, general deterrence and denunciation should be given priority, although of course the prospects of the offender's rehabilitation and the other factors pertaining to sentencing must also be considered. Certainly, a stiff penitentiary sentence is generally called for. (at para. 24)

[52] As Blair J.A. pointed out however, it is well settled that ranges are "not embedded in stone" and are guidelines only.

[53] In *R. v. Cooper*, 2010 ONCA 452, Watt J.A. speaking for the court referred (at paras. 89-90) to the court's decision in *Wright* and reaffirmed that sentencing "ranges" such as described in *Wright* are not immoveable or immutable, cautioning against the error of treating *Wright* as authority for imposing a *de facto* minimum sentence for the offence of home invasion. Watt J.A. observed that individual cases may fall within or outside the range and that individual circumstances matter.

[54] All counsel agreed that *Wright* sets out what the usual range of sentence is for robbery involving a home invasion. The central issue is whether or not either or both of these defendants ought to be sentenced below that range. For that they relied on cases where the defendants were sentenced below this range to support their positions.

Specific Cases relied upon by the Crown

R. v. Wright

[55] In *Wright*, five men armed with handguns, wearing gloves and disguises committed a home invasion. The male complainant, a father, was forced to hand over keys to his business and

[1] Although in this paragraph Blair J.A. states the range starts as low as four years, at paras. 18 and 21 he refers to five years as the bottom of the range. I have assumed the bottom of the range established in *Wright* is four years.

write out an alarm code and combination for a safe. The court noted that this very serious crime was planned and targeted. The father, his wife, two children and nanny, were forcibly confined and terrorized at gunpoint in their home, the father was essentially told that he would be shot if he did not cooperate and this was in earshot of the rest of the family, including an 11 year old boy and an older daughter who could hear her father crying. The victims endured this ordeal for approximately 45 minutes and there was no indication that it would have ended—or ended before even more harm was done—had the police not arrived. The appellant was a full participant in these criminal activities and may well have been the perpetrator who directly threatened the father.

[56] The appellant had pleaded guilty. He was 27 at the time of sentencing and had a prior record involving four convictions for theft, and one conviction for fail to attend court. He was supported by the mother of his two year old child and by his own mother, as well as by many friends all of whom viewed the home invasion conduct as "out of character". The trial judge had been impressed with the remorse the appellant had demonstrated in his statement to the court. At paras. 29-31, the court on appeal found that the sentence of eight years imposed by the trial judge was not demonstrably unfit even though this home invasion was not "in the upper echelons of home invasions in terms of…gravity".

[57] The circumstances of the offence in *Wright* are clearly more aggravating than the case at bar, particularly as handguns were involved. Furthermore, the period of unlawful confinement was much longer, there were specific threats made to shoot the father within earshot of his family and the defendants wore disguises and, of course, the offender was older.

R. v. Keays, [2007] O.J. No. 1151 (Ont. C.A.)

[58] Very few facts are available from the decision but it seems that in this home invasion the complainants were threatened at gunpoint and held hostage in their own homes for over an hour. As the offenders were leaving, the appellant poured alcohol over the complainants and threatened to set them on fire. The appellant had taken strides to rehabilitate himself and his progress was encouraging. The Court of Appeal upheld a sentence imposed by the trial judge of six years less 14 months for pre-trial custody.

[59] Ms. Stanford submitted that this decision is the most analogous to the case at bar but I disagree. Although there are some similarities, the offence committed in *Keays* was clearly more serious than the case at bar and the court found that the appellant was the instigator. Threats made at gunpoint and the period of confinement was much longer. The conduct at the end which led to the threat to set the complainants on fire is particularly troubling. There is no evidence as to the age of the appellant although he had taken strides to rehabilitate himself.

[60] *Keays* is of assistance on another point however; the absence of a formal Victim Impact Statement in the case at bar. In coming to their decision in *Keays*, the Court of Appeal noted that the trial judge took into account that this was "not a home invasion on a family or a little old lady or people who generally are law-abiding citizens" (at para. 9). The court did not suggest that this

was not a proper consideration but this seems to be at odds with the Court of Appeal's decision in *R. v. Whalen*, 2011 ONCA 74 where at para. 9 the court stated:

> There is some suggestion that at least one of the victims was involved in the drug trade. The trial judge seems to have thought that the absence of a victim impact statement entitled him to infer that the victims had not suffered any "unusual" harm. This was a terrible experience for anyone to go through and to the extent that the trial judge minimized the seriousness of the impact on the victims because of their backgrounds, he was wrong in doing so.

[61] In my view, although I found that Ms. [redacted] was complicit in the sale of marijuana from her home, she is no less deserving of protection from a home invasion than any law-abiding citizen. Certainly her children do as well. I prefer the views of the court in *Whalen*. Although the degree of vulnerability of the victim and the resulting impact of a crime on that victim may have some bearing on sentence, a crime of this nature will have a serious impact on anyone, regardless of their circumstances. The fact there were two young children in this case makes the impact more severe.

<u>*R. v. Harriott*, [2002] O.J. No. 387 (Ont. C.A.)</u>

[62] In this case two men (one white male and one black male) forced their way into an apartment. They were wearing stockings over their heads and one was wielding a gun. They told the husband and wife in the apartment that they wanted to take money, drugs and jewellery. They led the husband into the bedroom where they collected a few pieces of jewellery and the intruders took money from both complainants. At one point the wife's mouth was taped and the black intruder told her that if she did not have the jewellery at the count of five he was going to shoot her. As he got to three the other intruder said they had to leave. The black intruder then kicked the wife in the back and she fell to the floor. The intruders then left.

[63] Following a second trial, the trial judge imposed a sentence on the black accused of ten years from which he deducted about five months. The main issue on appeal was whether that was supportable because this sentence was higher than the four years the trial judge in the first trial sentenced the accused to. The accused also argued that his sentence was unfit as it was disproportionate to sentences imposed on the white intruder and the getaway driver. The Court of Appeal rejected both submissions and concluded that it could not say that the trial judge had erred in concluding that the original sentence following the first trial was inadequate.

[64] Although this case is helpful on the principle of parity, factually the circumstances of the offence are much more serious than the case at bar.

<u>*R. v. J.B.*, [2011] O.J. No. 875 (Ont. S.C.J.)</u>

[65] In this case the female offender was convicted of a robbery involving a home invasion. The offender had assisted two men to get into an apartment by propping open the side door of the apartment building with a pop can. The offender had a friend and the friend's mother living in the apartment. The men wore masks, had guns and demanded money and drugs. Both victims were physically assaulted by pushes, punches and kicks and the apartment was ransacked. The offender was a first offender with a difficult upbringing. The PSR spoke very favourably of the efforts the offender had made to rehabilitate herself since the offence. The court found that although the offender did not participate directly in the robbery she was a party to it and more importantly she orchestrated it and knew or was wilfully blind to the fact that the robbers would use force against the victims and that a robbery of this nature would inflict severe psychological damage. Baltman J. concluded that she was reluctant to interrupt the offender's meaningful efforts at rehabilitation by incarcerating her for a lengthy period but the principle of denunciation was paramount. She sentenced the offender to four years less pre-sentence custody.

[66] Again in this case it is significant that the men had guns and there were other serious factors not present in the case at bar. The offender was a first offender but was 31 years old.

R. v. D.W., [2004] O.J. No. 5825 (Ont. S.C.J.)

[67] In this case Justice Nordheimer sentenced the offender, who had pleaded guilty, to ten years for robbery with a firearm and unlawful confinement and uttering a threat. The offender along with two other males had committed a home invasion; each armed with a handgun. In the home were the male victim, his girlfriend, his mother and three children, one as young as four years old. The men demanded money, jewellery and drugs and were eventually given a quantity of money, some jewellery, some cocaine and some marijuana. Throughout the offender threatened to kill the male victim and repeatedly punched him and hit him with his gun and with another object. He was waiving his gun around and threatening the male victim in a manner that Justice Nordheimer concluded put the lives and safety of the children at risk. The offender was clearly the ringleader of the invasion.

[68] The offender was 24 years old, and had a criminal record dating back to his youth consisting of convictions for, among other things, assault, aggravated assault, possession of a weapon, break, enter and theft and assault with a weapon. His sentences ranged from a suspended sentence to a few months in prison. He was on probation at the time of the offence in question. Nordheimer J. found little in the way of mitigating factors save that the offender pleaded guilty and apologized to the victims for his actions. Counsel agreed the range of sentence was between 7 and 13 years. The offender was given a credit of two years for his pre-trial custody. Nordheimer J. concluded that the robbery was at the more serious end of the scale. He sentenced the offender to 10 years on the charge of robbery with a firearm, time served on the forcible confinement charge and on the charge of uttering a threat, imprisonment of four years concurrent. The sentences took into account a credit of two years.

[69] The circumstances of the offenders in this case are not comparable to [redacted] in particular or [redacted]. The offender's criminal record included crimes of violence and there were threats to kill with a handgun and the level of gratuitous violence used in that case not found in the case at bar.

[70] In summary, all of the cases relied upon by the Crown involve the use of real handguns and home invasions that are arguably more serious for a number of reasons than the home invasion in the case at bar. Significantly, none of the sentences deal with youthful offenders.

Specific Cases relied upon by the Defence

[71] Mr. Stastny relies on two cases of general principle which he submits apply in this case to [redacted] as a youthful first offender:

R. v. Priest, [1996] 93 O.A.C. 163 (Ont. C.A.)

[72] Mr. Stastny relies on this case for the proposition, set out at para. 23, that: "…it is a well-established principle of sentencing laid down by this court that a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather

than *solely* for the purpose of general deterrence. [emphasis added] At para. 17 however, the court made it clear that different considerations apply for very serious offences and offences involving violence. Clearly home invasion style robberies come within that exception.

[73] In any event, I do not accept Mr. Stastny's submission that *Priest* overrules *Wright* as to what sentencing objectives are considered paramount in a home invasion style robbery involving a first offender. I do not see a conflict in the two decisions. It is a question of focus. The court in *Wright* held that the principles of deterrence and denunciation are paramount in home invasion cases. However, *Wright* also made it clear that rehabilitation is to be considered when considering the circumstances of a particular offender. The fact an offender has no record or will be sentenced for the first time to imprisonment is clearly an important consideration. This was made clear by Justice Watt in *Cooper* who observed that no restorative justice objectives were at work in *Wright*.

R. v. Borde, [2006] 168 O.A.C. 317 (Ont. C.A.)

[74] Mr. Stastny referred to this case in support of his position that in addition to restraint I should take into account the fact that Mr. [redacted] are youthful offenders. In *Borde*, the accused, an 18 year old offender, pleaded guilty to pistol-whipping a victim with a loaded handgun that discharged. The victim was not injured by the bullet. The accused had an extensive and serious youth record and had recently been involved in an incident in which he fired a handgun into the air. He had a difficult background as part of dysfunctional family being raised in poverty by a mother with mental illness. At para. 36 the court stated:

> Aside from the gravity of the appellant's crimes, *the overwhelming factor is his youth*... the trial judge erred in principle in focusing *almost exclusively* on the objectives of denunciation and general deterrence, given the appellant's age and that this was his first adult prison sentence and his first penitentiary sentence. The length of a first penitentiary sentence for a youthful offender should rarely be determined *solely* by the objectives of denunciation and general deterrence. Where, as here, the offender has not previously been to a penitentiary or served a long adult sentence, the courts ought to proceed on the basis that the shortest possible sentence will achieve the relevant objectives. [emphasis added]

[75] Again I do not see a conflict in the guidance from the Court of Appeal in *Borde* and *Wright*. In the case of a young offender, or for that matter any offender, *Wright* does not require that the court focus *solely* on general deterrence and denunciation. Rehabilitation is an important factor to consider where the circumstances warrant such consideration.

[76] Many of the other cases relied upon by Mr. Stastny are from the Ontario Court of Justice. Ms. Stanford submitted that the cases from the Superior Court generally have increased sentences but having considered the cases that she relies upon, to some extent that may be due to the fact that they dealt with cases at the more serious end of the scale. It is the case however, that in most of the cases Mr. Stastny relied upon there were unconditional guilty pleas by the

offender resulting in no requirement in testimony from the complainant at either the preliminary hearing or the trial. That is a significant mitigating factor not present in this case, at least not with respect to Mr. [redacted]

[77] Mr. Stastny relies on the following cases in support of his position on the appropriate range of sentence in this case. Ms. Kideckel adopted his submissions in reliance on these cases.[2]

R. v. Walsh, [2011] 280 O.A.C. 198 (Ont. C.A.)

[78] The accused was convicted of home invasion related offences motivated by a search for drugs and sentenced to 18 months jail after a pre-sentence custody credit of two years based on 1 to 1.6 for time spent in a treatment facility, plus 3 years' probation. This was an effective sentence of three and one half years. There is no statement as to the age of the accused, who had a criminal record including four penitentiary sentences. He was a self-described addict who had made extraordinary progress in rehabilitation while residing at a treatment facility while on bail. No Victim Impact Statement was filed.

[79] At para. 11, the court found that the sentence imposed was outside the normal range of five years and up for a home invasion robbery. The court determined that the trial judge had erred in his determination of pre-sentence custody and in focusing on rehabilitation at the expense of general deterrence and denunciation. The court held that an appropriate sentence would be eight years. However, at paras. 13-14, the court noted that they had had the benefit of fresh evidence with respect to the offender's rehabilitation that put this case:

> …into a *very rare* category. The fresh evidence confirms his unusual and exceptional efforts at rehabilitation and the continued success of those efforts…In the very particular circumstances of this case…given the rehabilitative progress Walsh has made and the fact that he is out in the community now and continuing not only to respond well but also to assist others facing drug-related problems - we are not inclined to interfere with the sentence imposed.

[80] Ms. Stanford relies on the language found in these passages to suggest that I must find exceptional circumstances to justify sentencing these offenders outside the range established by *Wright* and that that result should be rare. However, these statements need to be considered in context in that the Court of Appeal was considering a sentence imposed by the trial judge that was less than half of the sentence the court considered appropriate for that case.

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[2] Mr. Stastny included *R. v. Thomas*, 2012 ONSC 6653 (Ont. S.C.J.) in support of his position on the appropriate sentence but I do not find this case of any assistance as the accused was a police officer who was cut off in traffic and in course of arresting the other driver, struck the victim causing bodily harm. For various reasons, most of which are not found in the case at bar, the court, relying on *Wright* and *Cooper*, found that this was an exceptional case requiring a sentence outside the normal "range".

R. v. Cooper, 2010 ONCA 452

[81] Two accused aboriginals, Jacko and Manitowabi, along with 2 others aboriginal persons, pushed their way into the victims' apartment, beat the victims, and took the victims' property. One of the other two aboriginal persons pressed a knife to the neck of the female victim. Both accused were convicted of home invasion related charges and sentenced to concurrent terms of imprisonment of four years on each count.

[82] The accused Jacko, a status Indian, was 19 at the time of offence. He had a criminal record that included crimes of violence. The relationship between Jacko's parents was abusive and dominated by assaults and excessive alcohol consumption. Jacko suffered "excessive physical discipline at home". The court found that the home invasion offence proved to be an "epiphany" for Jacko; he made significant progress in rehabilitation while on bail release.

[83] I have already set out why the Court of Appeal concluded that the trial judge erred by treating the range of sentence discussed in *Wright* as imposing a *de facto* minimum sentence for these offences. Justice Watt noted that the sentencing objectives of deterrence and denunciation were paramount in *Wright* and that no restorative justice objectives were at work in *Wright*, unlike the case before him where their influence is profound, at least in the case of Jacko.

[84] As to what the sentences ought to be, Watt J.A. commented on the seriousness of the offences including the fact there was a planned entry, looting and robbery, facial disguises, except for Manitowabi, albeit inadequate to their task of preventing identification, use of a weapon, physical violence and threats and knowledge or at least recklessness that the premises, a home, was occupied at the time of the forced entry.

[85] Watt J.A. held that although the sentencing objectives of denunciation and deterrence were destined to occupy positions of prominence in the sentencing decision, restorative justice sentencing objectives were of crucial importance in the circumstances. He stated at para. 87 that:

> In cases such as these, we must do more than simply acknowledge restorative justice sentencing objectives and note approvingly the rehabilitative efforts of those convicted. They must have some tangible impact on the length, nature and venue of the sentence imposed. The rehabilitative efforts here, more specifically those of Jacko, extend well beyond the promises made all too frequently between conviction and sentence, and all too infrequently executed and maintained in the days, weeks and months following imposition of a lenient sentence.

[86] For these reasons Justice Watt concluded that an appropriate sentence for Jacko was two years less one day to be served in the community (conditional sentences were still permissible at this time).

[87] As for Manitowabi, he was 18 at the time of the offence and had a criminal record that included crimes of violence. He reoffended while on bail and served a jail sentence for robbery and disguise with intent. Justice Watt observed that he had not been either persistent or

consistent in his efforts at self-rehabilitation and that what was more predictable was the likelihood of recidivism. He concluded that an appropriate sentence was two years less one day to be served in a provincial reformatory. (at paras. 103-104)

[88] Although the fact that the offenders in this case were aboriginal was an important factor on sentencing, what this case does clearly demonstrate is that the circumstances of the individual offender are important and where the circumstances justify it, the principles of restorative justice and rehabilitation can have a profound impact on determining the appropriate sentence and take a case outside the range of sentence described in *Wright*.

R. v. Whalen, 2010 ONSC 2719 (Ont. S.C.J.), affirmed Court of Appeal, 2011 ONCA 74

[89] Mr. Stastny submitted that this case was the most similar to the case at bar. The accused, May and Whalen, and two other persons (Bello & Argueta), were involved in a heavily armed home invasion in search of drugs and cash in which a whole family (mother, three sons, and one of the son's girlfriends) were detained, assaulted and terrorized in their home. Weapons used included a firearm or imitation firearm, hammer (May), machete (Bello) and crowbar (Argueta). One victim fatally shot the assailant Bello with a firearm. Taliano J. found that the firearm likely was already in the home. Argueta and May attempted to escape the scene in the getaway car; Whalen was waiting as the getaway driver. Neither May nor Whalen were in the room when the shooting occurred. They were stopped by police and arrested.

[90] Both May and Whalen pleaded guilty. They were both released on restrictive bail and made significant strides at rehabilitation while on release in work, education and counseling. Taliano J. held that given that the offenders were young, the principle of restraint remained a necessary consideration on sentencing.

[91] May who was 20 at the time of sentencing had a "serious criminal record" including convictions for arson and two robberies. His PSR indicated he was "seriously deprived by his upbringing" by parents who had mental health issues and admitted that they abandoned their parental responsibilities to their son. Whalen was 22 and also had previous record of offences including possession of narcotics and a weapon and breach of bail. He too had what was described as a turbulent childhood with no support or relationship with his father.

[92] May was sentenced to two years less a day and Whalen was sentenced to a 21 month term of imprisonment, in both cases *after* unstated credit for pre-trial custody and stringent bail terms. In addition, probation for a period of three years was imposed on each offender.

[93] On appeal, the court upheld these sentences. At para. 8, the court concluded that sometimes the proper exercise of discretion by a trial judge takes a sentence "out of the range" and that the trial judge who saw substantial potential for rehabilitation for both of these young men and found that there was a real opportunity for them to become productive law-abiding citizens, had properly exercised his discretion.

[94] I agree with Mr. Stastny that there are many similarities between this case and the case at bar. Save for the fact no children were present; the circumstances of the home invasion appear to be more serious. As I will come to, the case has more relevance in sentencing [redacted]

R. v. Barnes, [2006] O.J. No. 5163 (Ont. S.C.J.)

[95] The offender and three other men, wearing masks, forced their way into a residence at 11 p.m. at night. One of the men was brandishing a handgun. The residents of the home were a husband and wife and their children aged three and several months. It is not clear but it seems that only the husband and wife were forced into their dining room where the men demanded their money and credit cards. They were tied up and forced to sit while the men ransacked their home. It is not clear what happened to the children. The men, other than the offender, took turns pointing the handgun at the complainants and told them to be quiet or they would be hurt. It could not be established that the handgun was real but the victims believed it to be real. A victim impact statement set out the devastating impact this offence had on the victims both emotionally and financially.

[96] The offender was 21 years of age and he pleaded guilty to charges of robbery and unlawful confinement. He was born in Jamaica and moved to Canada at age one with his mother and had never had any sustained contact with his father. His mother remained supportive of him. He had a two year old son and had been working for his uncle on weekends as a licensed mechanic. Justice Durno was satisfied that he was remorseful and he was a first offender. Durno J. considered the absence of potentially aggravating factors including the fact the offender was not the prime mover in organizing the offence and the offence did not involve gratuitous violence as occurred in some of the other cases. The court noted the obvious aggravating factors of the use of what the victims believed to be a real handgun (I presume that as in the case at bar he did not find that it was in fact a real firearm), the forcible entry into their home, the impact on them as reflected in the victim impact statement, the fact there was some planning and deliberation, the fact motivation was pure profit, and the fact two children were in the house. Durno J. considered the most disturbing aspect to be the fact that this house was randomly selected and he observed that unlike many offences of this nature it was not a home targeted because of criminal activity already occurring in the house perhaps in the hopes the victims would not call police. In addition the offender at the time of the offence was on a bail release order that required him to live with his surety and observe a curfew. Durno J. sentenced the offender to four years less pre-sentence custody for which he was credited seven months.

[97] Justice Durno's decision was decided before *Wright*. He did refer however, to the Court of Appeal's earlier decision of *R. v. Ferreira*, [1997] O.J. No. 799 (Ont. C.A.) where the court held that the appropriate range for home invasion cases was between five and eight years. Because the offender did not have a criminal record, and because a co-accused who had a youth court record for violence and for robberies had been sentenced to the equivalent of a five year sentence less a credit of one year pre-sentence custody, Durno J. concluded that a sentence of four years would be appropriate, less pre-sentence custody for the robbery/unlawful confinement charge.

[98] Although this case was in the Crown's brief, Mr. Stastny relies on it as establishing the upper end of the range of sentence he submits applies in the case of Mr. [redacted] I agree with him that the role of the accused was similar to the role of Mr. [redacted] in that at paras. 21-22 the court stated:

> A sentence must be proportionate to the gravity of the offence, here the charges are most serious, and the degree of responsibility is also high, albeit he was not the leading party. He was an active participant, not in the violence but certainly in going into the home and then in attempting to collect the money. He knew at least when he got to the home what he was there to do. He became involved and continued with the activity…I have to consider as well that he had not been to jail at the time of the commission of the offences, his age and that his rehabilitation is also a relevant factor.

[99] Mr. Stastny argues that in *Barnes* the four year sentence was motivated in part by what was described as a devastating Victim Impact Statement and the fact that the offender had been convicted three times since the date of the offence before the court had been committed. For these reasons he submits that the sentence in this case for Mr. Brown should be less. I have already commented on the absence of a Victim Impact Statement but agree with Mr. Stastny that the post offence conduct of the offender in *Barnes* makes the case more serious than that of Mr. Brown. Otherwise, apart from the fact that this was a random attack, there are many similarities and so I do find this case helpful in determining a sentence for both Mr. [redacted].

[100] The cases from the Ontario Court of Justice relied upon by Defence counsel are as follows:

R. v. Brown, 2012 ONCJ 564[3]

[101] The accused and three other males, all disguised, broke into and ransacked an empty apartment. On the same day, the accused and same three males knocked on the door of a different apartment in a different building and forced their way into the apartment. The group was armed with a twelve inch "silver blade knife". Monies were demanded from two victims (father and son) and both were assaulted and directed to lie face down on a bed in the apartment. The victims were told not to look at the group and that if they called the police the offenders would come back and shoot them. The home was ransacked for valuables.

[102] The accused, who was 20 years old, pleaded guilty. He had a minor criminal record including some sexual offences as a youth where he received two years' probation, and one adult conviction for assault causing bodily harm, where he received a suspended sentence and two years' probation. The accused grew up without a meaningful relationship with his biological father and had grown up in a subsidized housing community where "drug use, violence, and other criminal behaviour" were common. While incarcerated the accused completed programs

[3] Also cited as *R. v. D.B.*

for anger. The court, after taking into account the sixteen months pre-trial custody served, imposed a sentence of an additional twenty months to be served in a provincial reformatory facility for the robbery and ten months to be served concurrently for the break and enter theft in addition to two years of probation on terms which included management for substance abuse.

R. v. Chung, 2012 ONCJ 275

[103] The accused was a party to a home invasion with three other males. Several of the parties were masked and one of the assailants was armed with a crowbar. One of the males broke a window to the residence with a long metal rod, and the three other males, including the accused, followed into the residence through the broken window. A struggle ensued with occupants of the home on the upper level. The occupants of the home were tied up with plastic zip ties. When the alarm went off the assailants fled the residence.

[104] The accused pleaded guilty. He was 19 with no criminal record. He had support from his family and community demonstrated by numerous letters on his behalf. The accused had complied with restrictive bail conditions for two years during which he had completed community service work and enrolled at Seneca College while on bail. The PSR was "excellent" and the accused "demonstrated significant empathy for and understanding of the victim's suffering".

[105] The court concluded that the appropriate sentence fell outside the range of sentence described in *Wright* and sentenced the accused to two years less one day in a provincial reformatory and two years probation.

R. v. Whitaker, 2011 ONCJ 178

[106] The accused and two other men entered a duplex looking for a second floor resident who was apparently known to them. The leader of the group was armed with a sword and all three were masked. Two first floor residents; a man and a woman, were assaulted. The woman suffered a broken nose. The accused was "not the apparent leader of the trio". He stole a bike and rode off. The accused had an extensive youth record including convictions for robbery, disguise with intent, and assault with weapon. He was subject to two youth court probation orders at the time of the offence.

[107] The accused pleaded guilty. He was 19 years old at the time of sentencing. The PSR relied upon from a previous youth sentencing indicated a concern of the accused's pattern of violence, identifying the danger he represented to the community in which he resided. He had a problem with alcohol and came from a dysfunctional family with serious substance abuse problems. His lack of education and employment led him to selling drugs for a living. The court was hopeful that his anticipated period of incarceration would help him complete his high school education, learn a trade and deal with his substance abuse issues. It was the accused's first adult sentencing.

[108] The court was of the view that there was nothing in his background and prior behaviour that would bring him within the purview of either *Cooper* or *Whalen* and was of the view that his "prior criminal history is a depressing demonstration that he is intransigent in his behaviour and commitment to criminality. His hope for rehabilitation is generic and based upon his age rather than his demonstrated behaviour". (at para. 42) Although a penitentiary term would be a fit sentence, in light of the accused's age and time spent in custody and the fact the sentence would be his first federal sentence, the court sentenced the accused to a further two years after taking into account a pre-sentence credit of seven and a half months, followed by three years of probation.

R. v. Shirley, 2009 ONCJ 266

[109] The accused was convicted after trial of home invasion related offences. He and another person attempted to break and enter a dwelling house while masked. The accused was confronted

by the homeowner, who held him down for police after having been struck with a hockey stick by the second assailant multiple times. The accused was found to have had a steel bar secreted in his pant leg. In his statement to police the accused stated that a friend and his girlfriend had invited him to the home of a man "who was in the business". The woman reported that the homeowner kept drugs and money in the house. The accused and the other person entered the home to steal property. The court found that the home invasion was so ill-conceived and poorly executed to be of relevance in demonstrating the accused's lack of sophistication and the relative danger posed by the assailants and that these facts distinguished the case from the others drawn to his attention by counsel.

[110] The accused was a youthful offender although his age was not specified. At the time of the offences he was on a conditional sentence in respect of drug offences. His PSR was "not a good one". The accused had had the benefit of a loving and supportive family but lacked stable employment. He had made no dedicated effort to furthering his education and presented as unmotivated and unwilling to commit to making any positive changes in his life. He exhibited little remorse and the court was of the view that there was a strong likelihood that he would reoffend.

[111] The court considered the fact that the accused was not a first offender, but that he was a young one, not only because of his age but by reason of his relative immaturity. The court accepted the proposition that as a result, in exercising the principle of restraint, that the accused should not be sent to the penitentiary and even though the accused had absconded and was sentenced *in absentia*, sentenced him to 21 months in jail and one year probation.

R. v. Stansbury, 2007 ONCJ 668

[112] In this case the accused pleaded guilty to three counts of breaking and entering a dwelling to commit robbery and conspiracy to commit breaking and entering. The accused was the driver for a series of highly organized, brutal home invasions that included use of firearms and degrading sexual assaults. The accused did not enter any invaded homes but participated in driving other members of the conspiracy to banks. The court found that although he may not have known that the female complainants would be sexually assaulted, he had to have known from the outset that the chances of the degree of violence which would be used were very high.

[113] The accused was a 22 year old first offender and had complied with strict bail conditions. His behaviour was considered shocking and out of character and he produced multiple character references from all aspects of his life. The accused was providing evidence at trials of other conspiracy members, which was a significant factor in mitigation. The court also found it significant that given the offender's age, and in the interests of his rehabilitation that he not be exposed on his first incarcerate term to the penitentiary stream. The court concluded that as a result of several factors the sentence to be imposed should be outside the range set out in *Wright*. The court accepted the Crown's position and sentenced the accused to two years less one day, in addition to one month pre-trial custody.

[114] Mr. Stastny argued that the circumstances of the offences in this case were more serious than the case at bar and I agree with that submission, not only because of the degree of violence used and the presence of firearms, but also in light of the fact that the accused was being sentenced to three home invasion style robberies. In my view the fact that this sentence was proposed by the Crown, presumably because the accused was testifying as a Crown witness, makes this case unreliable as a comparator. Based on the cases referred to me by counsel it seems well outside the range that I would find to be reasonable given the role of this offender in the three home invasions, notwithstanding his early plea, his youth and the other factors relied upon. I, therefore, do not find this decision of assistance.

Principles of Sentencing

[115] The principles of sentencing are set out in ss. 718, 718.1 and 718.2 of the *Criminal Code* and I am guided by those principles. The most fundamental principle is proportionality in s. 718.1; the fitness of the sentence must reflect the gravity of the offence and the degree of responsibility of the offender.

Determination of a Fit Sentence

[116] In considering the sentence to be imposed on each of these offenders I am mindful of the fact that they should each be considered individually as their individual circumstances and their roles in the home invasion are quite different. Mr. Stastny referred me to the Court of Appeal decision of *R. v. Courtney*, 2012 ONCA 478 where on appeal the appellant conceded that as compared to his companion he should have received a longer custodial sentence but, relying on the parity principle, argued that the disparity in sentences was extreme. The court held, relying on *R. v. Ipeelee*, [2012] S.C.J. No. 13 (S.C.C.), at paras. 78 to 79:

> …that the parity principle does not require that all co-accused be subject to the same sentence, or even that they be treated similarly for sentencing purposes. On the contrary, disparate sentences for different offenders, for the same offence, do not violate the parity principle so long as they are warranted by all the circumstances.

Common Aggravating Features

[117] Ms. Stanford did not refer to section 348.1 of the *Criminal Code*, which provides that in certain circumstances a home invasion in relation to a dwelling house is an aggravating circumstance. The requirements set out in the section apply to the facts of this case as I found them. This provision is consistent with the authorities as summarized by the Court of Appeal in *Wright* that the very nature of this offence, which violates the sanctity of one's home, is an aggravating factor.

[118] In my view the following facts are also aggravating factors relevant to the sentence of both defendants in this case:

a) Although the planning for the robbery may not have been elaborate or sophisticated, the robbery was not a spur of the moment idea. The defendants met just before the robbery and were clearly in conversation based on the surveillance video. Three of them were armed at least with an imitation firearm and they all wore gloves once they entered Ms. [redacted] home, not something one would expect them to have on hand at the end of April. It was a targeted home invasion planned to both give Mr. [redacted] a warning and to steal drugs and money. This means that they must have at least discussed the idea before this meeting.

b) The defendants knew, from the answer to the knock on the door by Mr. [redacted], that at least Ms. [redacted] was home. They knew Ms. [redacted] and must have known she had two very young children. They either must have known that the children would be with her or were reckless to that likelihood.

c) Three of the men had firearms and pulled them out as soon as they were in the home. Although I am proceeding on the basis that the firearms were imitation and not real, Ms. [redacted] believed them to be real.

d) Two young children were present. When Ms. [redacted] daughter started to cry she was threatened with a firearm held by [redacted].

e) Mr. [redacted] was slapped by Mr. [redacted] and then suffered a further injury in the basement which must have been inflicted by Mr. [redacted] or [redacted] or [redacted] but in any case in Mr. [redacted] presence. The injuries were not significant but gratuitous violence was used. Although Mr. [redacted] was present for the slap he was never in the basement.

f) I have already summarized the impact on Ms. [redacted] and her children. Ms. [redacted] was clearly traumatized by the home invasion as evidenced by the 911 call and notwithstanding her failure to provide a formal Victim Impact Statement, I am satisfied that this event not only caused her to move to another neighbourhood but also had a significant impact on her. As for her daughter, hopefully she will not suffer long term harm but she was understandably very frightened during the ordeal.

Common Lack of Aggravating Factors

[119] There are aggravating factors found in some of the cases referred to me by counsel not present in this case as follows:

a) The home invasion was relatively short; I would say in the range of seven minutes based on the fact that Ms. [redacted] left after five minutes and saw the defendants running away while she was on the 911 call.

b) The defendants and the others were not masked or disguised. That said, this is not a mitigating factor as they were clearly not hiding their identity because they did not expect Ms. [redacted] or Mr. [redacted] to call the police. I do not accept Mr. Stastny's argument that the fact these men were known to Ms. Peters made it less terrorizing for her.

c) Neither [redacted] were tied up in any fashion.

d) No express threats were made to shoot anyone although the fact [redacted] pointed his firearm at Ms. [redacted] daughter would certainly have been interpreted in that manner by her and Mr. [redacted].

Determination of a Fit Sentence for [redacted]

[120] Having considered some of the common aggravating factors, I turn to a determination of what is a fit sentence for [redacted] I begin by considering his role in the robbery as compared to the others and in particular [redacted]

[121] [redacted] enabled the group to have access to [redacted] home and clearly participated as a principal in the robbery. Once the men were inside [redacted] house, [redacted] sole role was searching the kitchen. He must have been the person who took most, if not all, of the items that were stolen. Although [redacted] did not participate in any threats, did not have a firearm or order anyone to go to the basement, given that the main floor of this home is quite small, and given the layout, he must have heard all the conversations and been able to observe what was going on between [redacted], [redacted] and the other men. As such he witnessed the fact that guns were drawn inside the home, the slap of [redacted] face, Mr. [redacted] threatening Ms. [redacted] daughter and Mr. [redacted] ordering [redacted] and Mr. [redacted] downstairs to the basement. He did nothing to intervene and did not leave the home. The evidence, however, suggests that [redacted] was certainly not the ring leader. There is no evidence of him giving any directions to anyone.

[122] At trial Mr. Stastny argued that [redacted] was not a party to the unlawful confinement charges but I did not accept that submission as he must have known that it was intended that they would rob [redacted] and he knew that she and likely her children and possibly others were home when they forced their way into her home. On this basis I found that [redacted] had a joint intention with the other young men to unlawfully confine [redacted] once inside the home.

[123] Mr. Stastny submitted that [redacted] should be considered like the getaway driver. This submission however, ignores the fact that he was actually in the house and performed a key role in the robbery. Furthermore, he was the oldest of the four young men by at least two years and should have been the more mature and responsible one. He saw what was happening and did nothing to intervene. He continued in his efforts to steal property from [redacted] and although

he took no steps to prevent her from leaving, he did nothing to distance himself from what was happening.

[124] Turning to the mitigating factors, although [redacted] did not plead guilty, Ms. Stanford confirmed that [redacted] made an offer to plead guilty before the trial to robbery *simpliciter* and that offer was rejected. Mr. Stastny submitted that this is relevant to [redacted] remorse in that he was found guilty of a charge he was prepared to plead to in that he did not dispute that he was at the robbery but without a firearm. Ms. Stanford fairly conceded that there was what counsel termed a "constructive guilty plea" to the robbery charge but she submitted that there was no constructive guilty plea to the forcible confinement charge. She also argued that Mr. [redacted] position did not become clear in the trial until sometime after [redacted] testified. That is true but as Mr. Stastny submitted, he never suggested to [redacted] during his cross-examination that she was lying about what happened. The only challenge he made was on her evidence with respect to not dealing drugs from her home. With respect to the forcible confinement charge, the issues were legal ones not factual. [redacted] never disputed the facts or his role. For these reasons I agree with Mr. Stastny that there was a constructive guilty plea to the offences [redacted] has been convicted of and that this is a significant mitigating factor for sentence.

[125] Mr. Stastny submitted that Mr. Brown could not be released on bail as Justice Trafford wanted his mother to supervise him at all times which was not possible as she works full-time as a personal care worker. He argued that because Mr. [redacted] was denied bail he had less ability to rehabilitate himself pending trial. He submitted that there are things he could have done but not to the same extent as had he been released on bail. I accept this submission to some degree but there is no evidence before me as to what, if any, programs [redacted] could have participated in while in custody before the trial and why he did not participate in them. I would find it significant, for example, if there was evidence that he tried to complete his high school credits but was unable to because of a lack of resources in the remand centres where he was being held. I do not have the concrete steps taken towards rehabilitation by offenders pending trial found in many of the cases referred to by Defence counsel. I do recognize that such steps are easier to take if a defendant has been released on bail but I am concerned there is no evidence of even any attempts by [redacted] to participate in programming while in custody. The best evidence of the potential for his rehabilitation, therefore, comes from the PSR.

[126] Ms. Stanford submitted that [redacted] PSR is "more neutral" and she questioned whether he took real responsibility for the offence and harm to [redacted]. She saw the PSR as including a lot of blaming his peer group and not too much taking responsibility for the offence. I agree that there is some of this although there is no question that a young person's choice of friends can be a positive or negative influence. I would say, however, that the PSR report is positive and it is notable that the probation officer believes that [redacted] presented as sincere and that he appears to have the potential to improve his life in a very positive manner. As already stated, I came to the same conclusion hearing [redacted] brief statement to the court. I am satisfied that there is a real potential for rehabilitation in this case that must be considered in

imposing sentence. There also appears to be a need to deal with [redacted] admitted daily use of marijuana before he was incarcerated, as recommended by the probation officer.

[127] Mr. Stastny put some emphasis on the fact that [redacted] grew up without a father figure, as if that could explain his conduct. There is, however, no significant evidence of an unstable upbringing apart from when [redacted] was very young. He clearly has a strong bond with his mother who continues to support him. There is no suggestion of a dysfunctional family environment, quite the opposite. I, therefore, did not consider this to be a mitigating factor.

[128] There are a number of additional mitigating factors to consider with respect to [redacted] as follows:

a) Although [redacted] was the oldest of the group of four young men, he was only 21 at the time of the offences and is now 23. He is a youthful offender.

b) These convictions are [redacted] first convictions. That does provide support for Mr. Stastny's position that this conduct was out of character for [redacted].

c) [redacted] conduct in custody also speaks to his potential for rehabilitation.

[129] I turn then to what is an appropriate sentence for [redacted] in this case. Ms. Stanford submits that those factors require a penitentiary sentence in this case in the range of six years. Mr. Stastny argues that [redacted] should be sentenced outside the range to something close to a two year sentence.

[130] Clearly in light of *Wright*, denunciation and general deterrence are significant factors to consider. This was a home invasion at perhaps the lower end of the scale as although it involved what [redacted] believed to be a real firearm, that was not proven. Nevertheless it was still a very serious offence. A strong message must be sent by the court expressing society's abhorrence and that this type conduct will not be tolerated by the courts. Given the continued prevalence of this type of crime that message does not seem to be getting through.

[131] In this case, however, I have a youthful first offender who has taken some responsibility for his actions by not disputing his role in the home invasion and he has expressed remorse. I have concluded that there is a real prospect of rehabilitation. I accept the position of Mr. Stastny that [redacted] should not be sent to the penitentiary. This has been the first time that Mr. [redacted] has been in custody and he has already been in custody for almost 15 months. As I will come to, he will be given 22 months credit for that time.

[132] Although none of the authorities that I have been referred to are on all fours with the circumstances of [redacted], I do find the decision of Durno J. in *Barnes* and the decision of Taliano J. in *Whalen* to be helpful. The *Barnes* decision is somewhat dated and does seem to be at odds with the decisions provided to me from the Ontario Court of Justice. One explanation may be that no firearms, real or imitation, were used in any of those cases, save for *Stansbury*,

although there was significant use of other types of weapons and violence in many of those cases. I have already explained why I do not find the *Stansbury* case to be helpful.

[133] It is impossible to determine the sentence in *Whalen* before the credit for pre-sentence custody but the sentence was likely in excess of two years. As for *Barnes,* in imposing a penitentiary sentence of four year less pre-sentence custody, for a youthful offender, Justice Durno concluded, at paras. 29-30:

> I am not persuaded that a reformatory sentence, *even with the pre-sentence custody* would adequately reflect the gravity of this offence, the offender's degree of responsibility nor would it be consistent with the purposes and principles of sentencing. On this record I cannot conclude in terms of the submissions that were presented to me that it would be better in all the circumstances of the case for this young man to be sentenced to the reformatory. While being close to his family is a concern, it does not override the gravity of the offence and the need to deter others. It would also ignore the sentences imposed for similar offenders who had committed similar offences. While he is young and a penitentiary term should be avoided if it is reasonable to do so, I have concluded that a penitentiary term is required. …the sentence must still reflect the very serious nature of the home invasion offence.

[134] I agree with the observations of Justice Durno although as I have said, I find the circumstances of the home invasion robbery in his case to be more serious than the case at bar, particularly in so far as [redacted] is concerned. In considering all of the cases referred to me, the submissions of counsel and the aggravating and mitigating factors that I have set out, I have come to the conclusion that a fit sentence for Mr. [redacted] for the robbery conviction is two and a half years, less pre-sentence custody followed by a two year period of probation. A concurrent sentence of two years on the unlawful confinement conviction will also be imposed. As a result, [redacted] will have eight months left to serve.

[135] I appreciate that this sentence is well below the sentence requested by Ms. Stanford. I am satisfied however, for the reasons stated, particularly in light of [redacted] constructive guilty plea, his expression of remorse and the fact he is a first time youthful offender that his sentence should be outside the range of sentence set out in *Wright.*

Determination of a Fit Sentence for [redacted]

[136] I turn then to my determination of a fit sentence for [redacted]. I begin by considering his role in the robbery and unlawful confinement of [redacted].

[137] Mr. [redacted] conceded nothing during the trial and fought all issues. He denied using the nickname [redacted] and denied participating in any robbery of [redacted]. He took the position that Ms. [redacted] was either mistaken or lying when she picked him from a photo line-up. [redacted] also denied making any threats to [redacted] and testified that the phones found in

his possession belonged to someone with the nickname Kid. I did not accept that evidence and found that he participated as a principal in the robbery and unlawful confinement of [redacted] and [redacted] and that he threated [redacted] as she alleged on the 19th of March. He was, of course, entitled to require the Crown to prove its case against him but he can receive no credit of the type afforded to [redacted] for a constructive guilty plea.

[138] Furthermore, as compared to [redacted], [redacted] played a more significant role in the robbery and the unlawful confinement. He had a firearm that appeared to be real, he slapped Mr. [redacted] and is the one who told him to stop hustling on their block and he ordered [redacted] and [redacted] into the living room and then into the basement. He was present when [redacted] pointed his gun at [redacted] daughter and when the further injury to [redacted] occurred in the basement. The evidence suggests that [redacted] was at least one of the ring leaders, if not the main one. The threatening conviction is also an aggravating factor but as I intend to impose a separate sentence for that offence, I will not consider this as an aggravating factor for the robbery and unlawful confinement sentences.

[139] In addition to the common aggravating factors already stated, I find the fact that Mr. [redacted] was on a suspended sentence and a probation order resulting from his December 1, 2011 conviction for breach of recognizance when he was arrested for possession for the purpose of trafficking, to be an aggravating factor in this case. Although his criminal record could be characterized as minor and [redacted] does not have a criminal record for crimes of violence, as Ms. Stanford submitted, his record does demonstrate a disregard for the authority of the court. The fact that he was late for every reporting session following his December 2011 conviction is consistent with this and suggests a lack of any motivation to rehabilitate himself. Furthermore, he committed the offences before the court while he was released on bail after being charged with the drug offence. It is also of concern that the seriousness of the offences is increasing over time.

[140] I also agree with Ms. Stanford that given the number and nature of [redacted] misconduct finding while in jail calls into question any prospect for any rehabilitation for him as he now seems entrenched in a criminal lifestyle. Like the court in *Whitaker*, I find that any hope for [redacted] rehabilitation is generic and based upon his age rather than his demonstrated behaviour. He has no real prospects for employment. He appears to have no desire to get past his Grade 9 education. He has no interest in rehabilitation programs for substance abuse. According to the PSR, [redacted] didn't avail himself of any programs or take any high school courses while in custody, although the same could be said of [redacted]. Although arguably the onus is on the defendants, and although I would have preferred evidence on this, given the conditions in the remand centres I am not prepared to conclude that [redacted] failed to follow up on programs that might have been available to him. It is clear, however, that unless he decides to improve his education and/or train for a trade, there is a good likelihood that he will re-offend.

[141] There are, however, some mitigating factors relevant to sentence with respect to Mr. [redacted] consider:

a) [redacted] was only nineteen at the time of these offences.

b) Ms. Kideckel advised that [redacted] mother is supportive but her employer would not let her get time off to attend the sentencing hearing. Mr. Hersi's uncle was present. He, therefore, appears to have some family support.

c) [redacted] was working at a bakery through a temp agency and was being called in frequently before his arrest. He had not been working at this job for very long, however, and as I have already said, his employment history is weak.

[142] Although [redacted] cannot be penalized for insisting on his right to a trial and compelling the Crown to prove the case against him, he does not get the benefit of a reduced sentence because of a guilty plea. This is a neutral factor.

[143] [redacted] did express some remorse to the probation officer about the fact that children were present when these events occurred but when given the opportunity, he made no such statement to me. For the reasons already stated, I have concluded that his statement was not sincere and did not constitute any expression of remorse. I consider this to be a neutral factor as [redacted] is entitled to maintain his innocence although I note that he admitted to the probation officer that he was in [redacted] home at the time of the robbery.

[144] I have considered the prospect for rehabilitation and agree with Ms. Stanford that it is weak. I have already referred to my reasons for this conclusion. Overall my belief is that Mr. [redacted] does not appreciate the seriousness of his actions and lacks any motivation to change his life for the better.

[145] Given the fact that [redacted] played a more significant role in the robbery and unlawful confinement of [redacted], given he was in possession of an imitation firearm, given he does not get the reduction in sentence [redacted] was entitled to because of his constructive guilty plea, given his criminal record, albeit a minor one, and given my conclusion that his prospects for rehabilitation are generic only based on his young age, [redacted] sentence should necessarily be higher than the sentence that I have imposed on Mr. Brown.

[146] Given my review of the cases, I do not accept Ms. Kideckel's submission that [redacted] receive a sentence in the upper reformatory range of something less than two years less a day. On the other hand however, the position of Ms. Stanford essentially gives no discount to [redacted] because of his young age and assumes he is a lost cause in terms of rehabilitation. She may be correct in that regard although I hope that as [redacted] matures, he will come to choose a better life. As Ms. Kideckel pointed out, [redacted] is still young and certainly he has the ability, if he so chooses, to turn his life around.

[147] I have already commented, in my decision with respect to [redacted], on the importance of denunciation and general deterrence and the fact that this home invasion was at the lower end of the scale of those involving firearms, particularly as it was only proven [redacted] and the two youth offenders had a realistic imitation firearm.

[148] The question is: should [redacted] be sentenced to what would amount to a penitentiary sentence or should he be spared time in the penitentiary because of his age? I have already referred to the comments of Justice Durno in the *Barnes* decision which, in my view, apply with much more force to [redacted] given his role in the robbery, his lack of remorse and his dimmer prospects for rehabilitation.

[149] In summary, although [redacted] is a youthful offender with a relatively minor criminal record, he has not taken any responsibility for his actions, he has expressed no remorse save that he is sorry children were present and unfortunately his prospects for rehabilitation are weak. In my view, having considered all of the circumstances, a fit sentence for [redacted] is three and a half years less a credit for pre-sentence custody. As I will come to, I am not prepared to give Mr. [redacted] enhanced credit.

[150] In coming to this decision I have also considered how Mr. [redacted] sentence for the robbery compares to [redacted]. I conclude that a difference of one year is warranted given the fact Mr. [redacted] had a less significant role in the robbery, his constructive guilty plea and his prospects for rehabilitation are much stronger.

[151] I turn then to what is a fit sentence for the conviction for threatening [redacted]. I agree with Ms. Stanford that the seriousness of this offence cannot be underestimated. There is a "code of silence" in neighbourhoods like [redacted] which undercuts law enforcement and empowers criminals to commit crime. Witnesses are reluctant to come forward because of fear of retaliation. We see this often in our courts. [redacted] was prepared to come forward and say what happened but these threats were an effort to prevent that. There has to be a clear signal of denunciation and deterrence that such behaviour will not be tolerated. In my view this can only be achieved by a consecutive sentence. Accordingly, a consecutive sentence of one year as proposed by Ms. Stanford is, in my view, a fit sentence for this conviction.

[152] Although not relied upon by counsel, I have considered the jump principle since Mr. [redacted] longest sentence before these offences was 80 days which he served while in pre-trial custody on these charges. However, the jump principle has limited application in this case given the seriousness of these convictions. I have also considered the totality principle and have concluded that a global sentence of four and a half years is not unduly long or harsh or excessive given Mr. Hersi's role in these serious offences and his personal circumstances that I have already referred to.

[153] Finally, I appreciate that, at least with respect to the sentence I have imposed on Mr. [redacted] for the robbery conviction, it is significantly less than the sentence proposed by the Crown and significantly more than the position taken by his counsel. I have given my reasons for why, notwithstanding Mr. [redacted] youth, the sentence I have imposed is fit. I do not accept, however, the position of Ms. Stanford which would be in my view a crushing sentence that would likely eliminate any hope for [redacted] rehabilitation.

Entitlement to Enhanced Credit for Pre-Sentence Custody

[redacted]

[154] Ms. Stanford conceded that [redacted] should be entitled to enhanced credit at the rate of 1.5 for every day served. Given my understanding of the Court of Appeal's decisions in *R. v. Summers*, [2013] O.J. No. 1068 (Ont. C.A.) and *R. v. Morris*, [2013] O.J. No. 1583 (Ont.C.A.) this is a very reasonable concession. In addition to the positive prospects for rehabilitation, Mr. [redacted] has not engaged in any misconduct while in custody. Furthermore, information received from the security unit of the Toronto Jail where [redacted] has been from July 23, 2012 to present demonstrates that he has been triple booked on 40 nights (although always had one of the bunks) and that he was in the general population with no special limitations. Although each inmate is entitled to fresh air every day, based on yard statistics the general population has only been able to attend yard an average of five days per month. This is mainly due to staff shortages and inclement weather. There is no exercise equipment available at the Toronto Jail.

[155] For all of these reasons I have no difficulty in granting [redacted] a full credit of 1 to 1:5 for his pre-sentence custody. As already stated, on that basis he is entitled to a credit of 666 days or about 22.2 months to the date of the sentencing hearing. That was eight days ago and so the total credit for pre-sentence custody is 687 (666+14) days or 22.9 months using the same method of calculation as Ms. Stanford. 22.9 months is higher than the actual credit for 687 days and, as I cannot give more than a 1.5 credit enhancement, I find that [redacted] is entitled to pre-sentence custody credit of 22 months.

[redacted]

[156] Ms. Kideckel submitted that [redacted] should receive enhanced credit of something more than 1:1 but acknowledged it should be less than 1.5. She asked that he not be re-penalized for the misconducts in jail as he had received penalties for each of those. Ms. Kideckel asked that I take the conditions in the Toronto Jail into account as set out by Justice Green in *R. v. Johnson*, 2011 ONCJ 77 at paras. 186-187. She submitted in addition that [redacted] was on the unit that flooded with sewage in the Don Jail in October 2012, which made the news. Although no evidence of this was presented, Ms. Stanford did not dispute that this incident occurred and the officer in charge was able to confirm that Mr. Hersi was personally impacted. Even if the news reports are exaggerated, it seems that the inmates affected were severely impacted and required to help in the clean up of the mess as part of their "rehabilitation".

[157] Although I have no evidence on behalf of [redacted], of the type that I received on behalf of [redacted], I am prepared to find, since the majority of his time has been spent at the Toronto Jail that his conditions have been worse than the conditions he would be in if he had already been sentenced and that given this flood, he has suffered harsh conditions that other inmates at the Toronto Jail have not.

[158] As I understand it there is no order pursuant to section 515(9.1) of the *Criminal Code* that states that [redacted] has been detained in custody primarily because of a previous conviction, which pursuant to section 719(3.1), would preclude any consideration of enhanced credit. However, Ms. Kideckel conceded that [redacted] breached his bail conditions resulting from the drug offence charge when he was arrested for the offences before the court. Furthermore, in light of the December 2011 conviction, I note that [redacted] was on probation pursuant to the suspended sentence at that time. Although I have not been advised that his bail was ever formally cancelled pursuant to subsection 524(4) or (8), had that occurred, that would have automatically precluded any enhanced credit now.

[159] As the Court of Appeal stated in *Morris* at para. 19, the absence of an order canceling the prior forms of release does not operate as an absolute bar to [redacted] request for enhanced credit under section 719(3.1). However, I am required to take into account all of the circumstances. Although he has suffered some unusual hardship while at the Toronto Jail, these offences were committed when Mr. Hersi was on a recognizance resulting from the drug charge; a charge that he ultimately pleaded guilty to. The circumstances before me are certainly analogous to subsections 524(4) or (8). (see *Morris* at paras. 15-16) Furthermore, [redacted] has committed eight misconducts while in custody. I have found his prospects for rehabilitation to be weak.

[160] For these reasons I decline to exercise my discretion in awarding [redacted] enhanced credit. His credit for pre-sentence custody shall be limited to time served; namely 416 (408 + 8) days or 14 months.

Final Disposition

[redacted]

[161] [redacted] would you please stand.

[162] With respect to your convictions for robbing [redacted] and [redacted] contrary to section 344(1)(b) of the *Criminal Code,* as set out as included offences in Counts # 1 and 2, I sentence you to two and a half years (30 months) on each conviction each to run concurrent to the other.

[163] With respect to your convictions for unlawfully confining [redacted] contrary to section 279(2) of the *Criminal Code,* as set out in Counts # 3 and 4, I sentence you to two years (24 months) on each conviction each to run concurrent to the other and to your sentence on Counts # 1 and 2.

[164] With respect to your sentences on Counts # 1, 2, 3, and 4, you will be credited 22 months for pre-sentence custody on each count on a 1:1.5 basis. After this credit you have a sentence of eight (8) months to serve.

[165] Once you are released from custody you will be subject to a period of probation for two years. In addition to the compulsory conditions of this probation order, provided for by section 732.1(2) of the *Criminal Code*, the additional conditions of the order pursuant to s. 732.1(3) of the *Code* are as follows:

a) Report within 2 working days of your release, in person, to a probation officer and thereafter when required by the probation officer;

b) Remain within the province of Ontario unless written permission to go outside the Province is obtained from the court or the probation officer;

c) Reside with your mother or at an address approved of by the probation officer and contribute to the cost of maintaining the household as you are able;

d) Do not change your address without the prior approval of the probation officer;

e) Abstain from the purchase, possession or consumption of any drugs, or other substances prohibited by law, except in accordance with a medical prescription;

f) Attend and actively participate in counseling programs or treatment program(s) for drug addiction or other issues as recommended by your probation officer and sign releases to monitor compliance as needed;

g) Make reasonable efforts to complete your high school diploma and further your education or vocational training and/or find and maintain suitable employment either as an employee or business owner and provide progress reports to your probation officer as directed;

h) Perform 150 hours of community service work. The work is to commence within 30 days of the date of commencement of your release from custody and shall be completed at a rate of not less than 10 hours per month in consecutive months and shall be completed to the satisfaction of your probation officer within eighteen months of this Order. You shall provide your probation officer with proof of attendance and completion of community service assignments;

i) Abstain from owning, possessing or carrying any weapon as defined in the *Criminal Code*;

j) Do not apply for nor possess a firearms acquisition certificate or any other form of gun license;

k) Do not have any contact directly or indirectly with [redacted], or be within 100 meters of where they are known by you to be;

l) Do not have any contact with, or be in the company of, or associate with [redacted];

m) You are not to have any contact with, or be in the company of, or associate with anyone known by you to have a criminal record or who is the subject of criminal charges except for members of your family or persons you come into contact with because of your employment, school or community service.

[166] [redacted], a copy of the Probation Order will be given to you by the court officials who will ensure that the substance of sections 732.2(3), 732.2(5) and 733.1 are explained to you regarding the probation order. Please pay very careful attention to all of these conditions. I must tell you that breach of any of these conditions will be taken very seriously by this Court. You must appreciate that incarceration will likely result if any of the conditions of your probation are breached. I hope that the terms that I have imposed will bring home to you the seriousness of your conduct, and assist you in remaining a productive and law-abiding member of our community once you are released from custody.

[167] In addition there will be a weapons prohibition order pursuant to subsections 109(1)(a) and 109(2) of the *Criminal Code* for life.

[168] In addition, there will be a DNA order pursuant to section 487.051(3) authorizing the taking of a DNA sample. The order shall apply to Counts # 1, 2, 3, and 4 which are primary designated offences.

[redacted]

[169] [redacted] would you please stand.

[170] With respect to your convictions for robbing [redacted] and [redacted] contrary to section 344(1)(b) of the *Criminal Code,* as set out as included offences in Counts # 1 and 2, I sentence you to three and a half years (42 months) on each conviction each to run concurrent to the other.

[171] With respect to your convictions for unlawfully confining [redacted] contrary to section 279(2) of the *Criminal Code,* as set out in Counts # 3 and 4, I sentence you to two years (24 months) on each conviction each to run concurrent to the other and to your sentence on Counts # 1 and 2.

[172] With respect to your conviction for uttering a threat to [redacted] to cause death to her contrary to s. 264.1 of the *Criminal Code* as set out in Count # 8, I sentence you to an additional 12 months to be served consecutively to your sentences on Counts # 1, 2, 3 and 4.

[173] With respect to your sentences on Counts # 1 and 2, you will be credited 14 months for pre-sentence custody on each count on a 1:1 basis. After this credit you have a total sentence of

28 months to serve on these counts. That means that the total remaining sentence that you must serve on all counts is 40 months (28 +12).

[174] Pursuant to section 743.21 of the *Criminal Code* you are prohibited from communicating, directly or indirectly, with [redacted] during the custodial period of your sentence.

[175] In addition there will be a mandatory weapons prohibition order pursuant to subsections 109(1)(a) and 109(2) of the *Criminal Code* for life.

[176] I also make a DNA order pursuant to section 487.051(1)(a) authorizing the taking of a DNA sample. The order shall apply to Counts # 1, 2, 3, and 4 which are primary designated offences.

SPIES J.

Released: June 27, 201
Edited Decision Released: July 2, 2013

CITATION: R. v. [redacted], 2013 ONSC 3321
COURT FILE NO.: 12-40000535-0000
DATE: 20130627

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

[redacted] and [redacted]

REASONS FOR SENTENCE

SPIES J.

Released: June 27, 2013
Edited Decision Released: July 2, 2013