CITATION: R. v. 2013 ONSC 3321 COURT FILE NO.: 12-40000535-0000

DATE: 20130627

ONTARIO

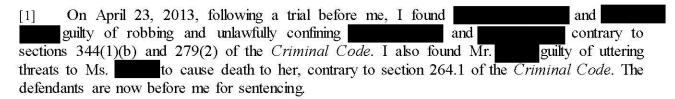
SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN)	Anna Stanford, for the Crown
- and -)	
and ()	Andrew Stastny, for the Defendant,
)))	John Scandiffio and Marsha Kideckel, for the Defendant,
	HEARD: June 19, 2013

SPIES J. (orally)

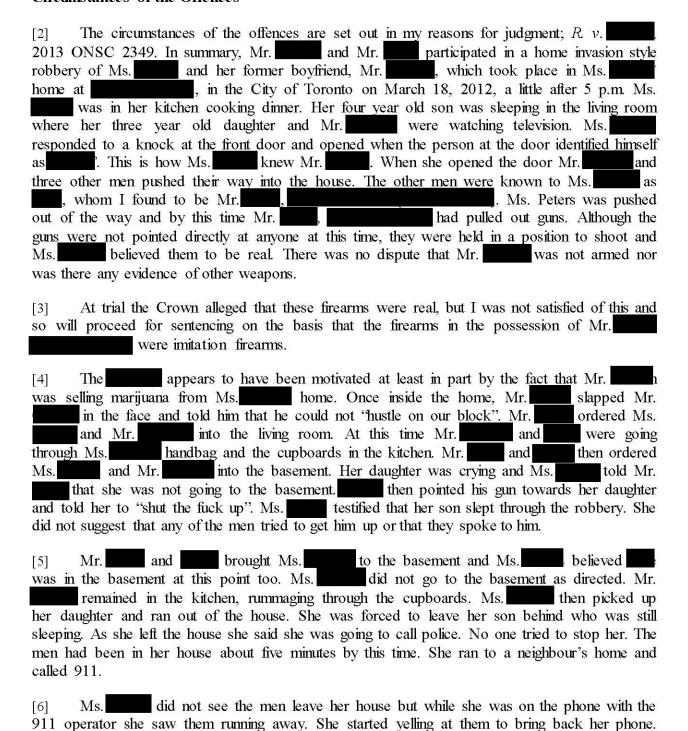
REASONS FOR SENTENCE

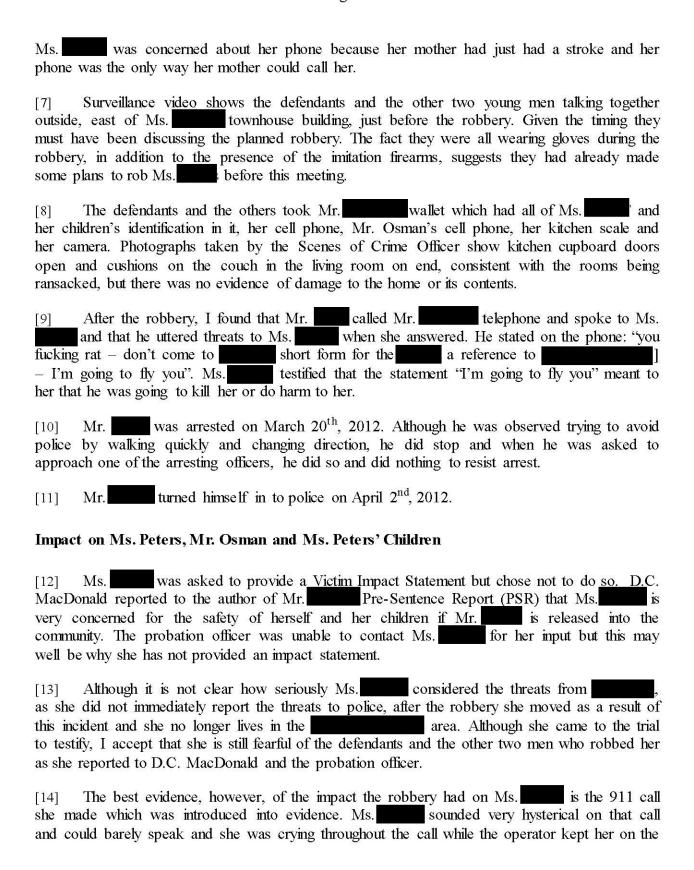
Overview

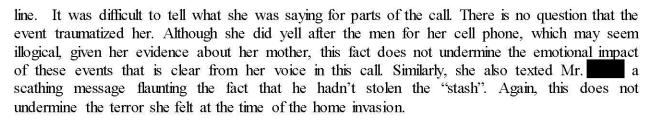


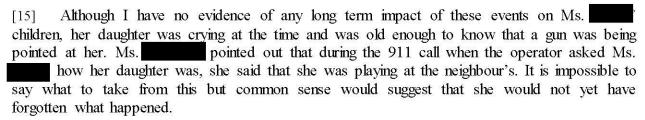
The Facts

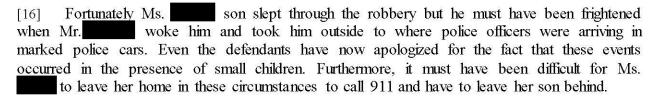
Circumstances of the Offences

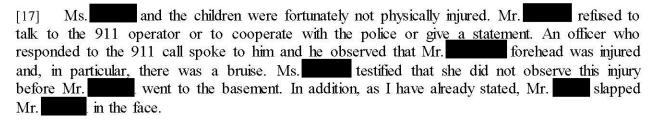






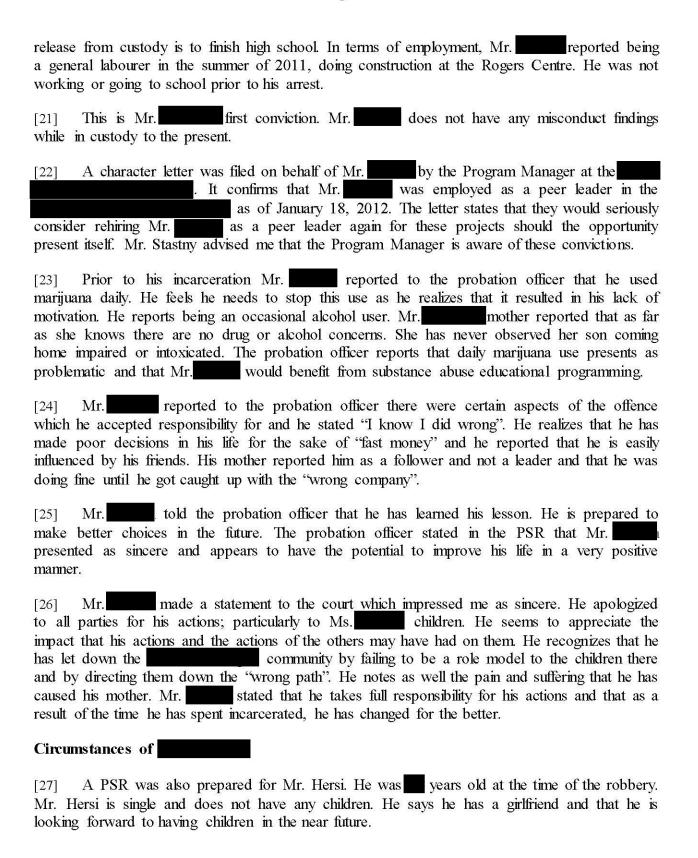


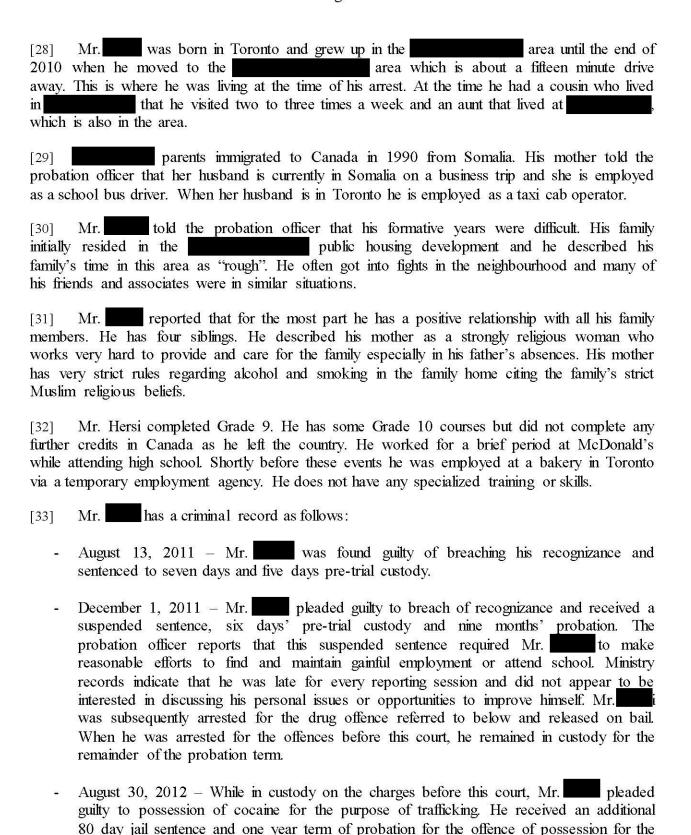


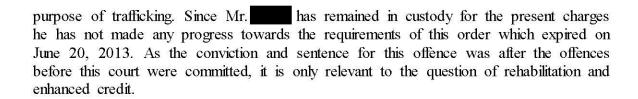


Circumstances of

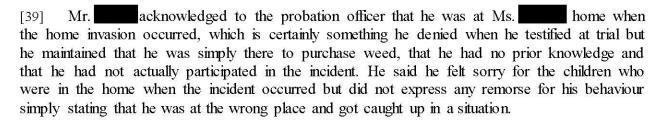
- I received a PSR with respect to Mr. Brown. He was years old at the time of the offences. He is now 23, single and has no dependents. He was born in Toronto and reported a stable childhood although he was raised only by his mother and never knew his father. He has three older half-sisters. He reported 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. mother reported that due to financial hardship she sent her son to live with her cousin in 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. 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







- Mr. 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. has committed a number of misconducts while in custody. Between May 1, 2012 and July 16, 2012, while Mr. 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. was found guilty of the same offence on three occasions, all involving different immates, between February 28, 2013 and March 19, 2013. More recently, while at the TEDC, Mr. was found guilty of the same offence, again with different immates, on two occasions, once in April and the latest on May 29, 2013. Although Mr. 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. 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.
- Mr. 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. 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. 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. 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. 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.



- [40] In the PSR the probation officer concluded that given Mr. 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. 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. is not presently ready to benefit from a further period of community supervision. He concludes that Mr. 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."
- Mr. began his statement to the court. I was not impressed with its sincerity. Notably Mr. 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. 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

Ms. Stanford submitted that Mr. 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. Ms. Stanford conceded that Mr. 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. 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. 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. It 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.
- With respect to Mr. for a number of reasons, Ms. 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. 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. submitted that Mr. 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 submitted that 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

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.
- 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 namy, 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.

- 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 were 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.

In my view, although I found that Ms. 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.

R. v. Harriott, [2002] O.J. No. 387 (Ont. C.A.)

- [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.

R. v. J.B., [2011] O.J. No. 875 (Ont. S.C.J.)

- 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 ringle ader 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 pretrial 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 particular or 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 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.

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. 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.

[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.

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.
- 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.

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

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.
- 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.
- 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.

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. I agree with him that the role of the accused was similar to the role of Mr. 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.

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

R. v. Brown, 2012 ONCJ 5643

[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.

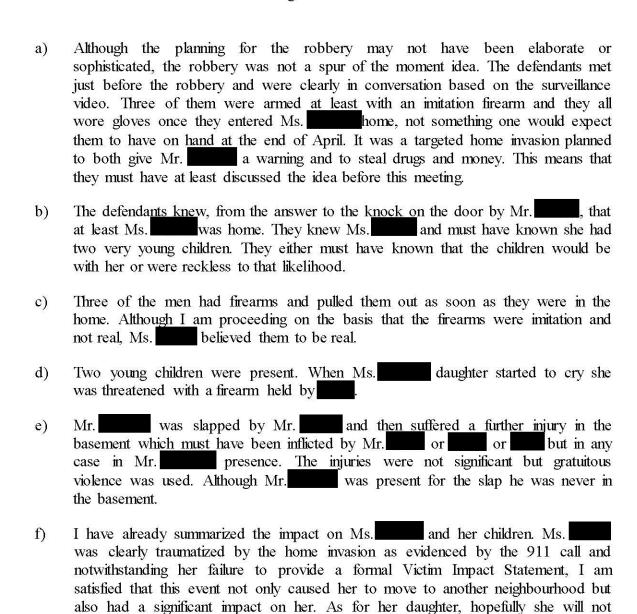
Determination of a Fit Sentence

[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:



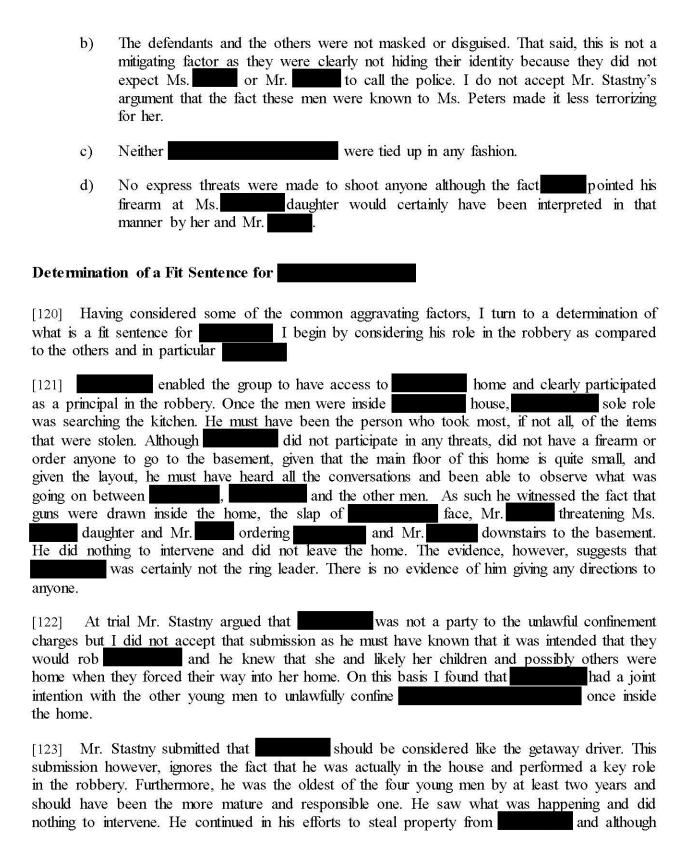
Common Lack of Aggravating Factors

ordeal

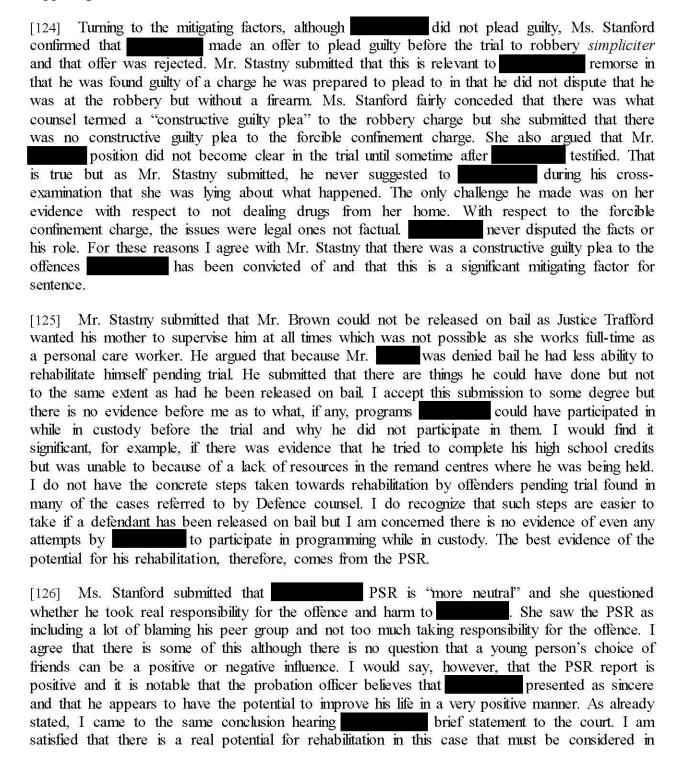
[119] There are aggravating factors found in some of the cases referred to me by counsel not present in this case as follows:

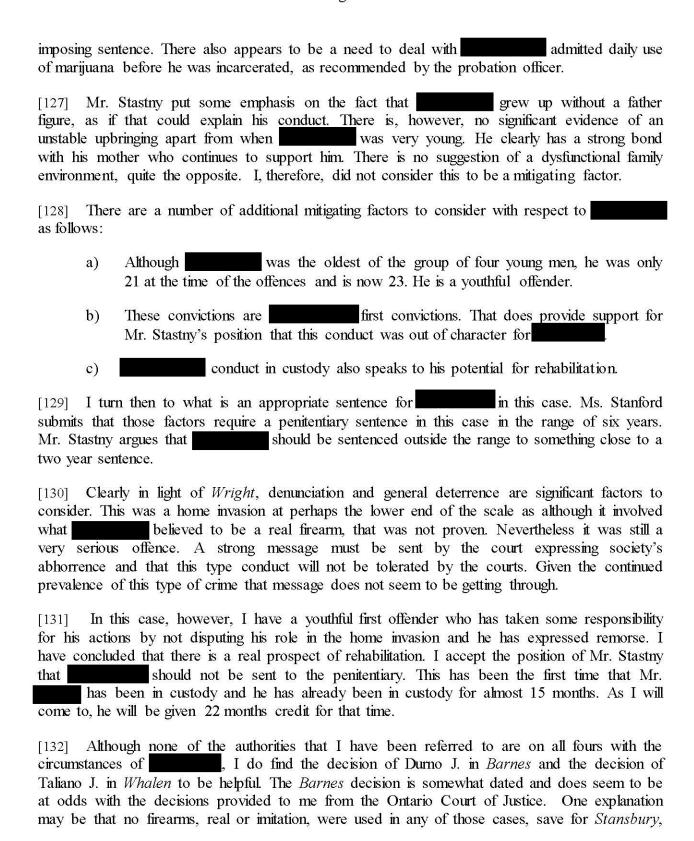
a) The home invasion was relatively short; I would say in the range of seven minutes based on the fact that Ms. left after five minutes and saw the defendants running away while she was on the 911 call.

suffer long term harm but she was understandably very frightened during the



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





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:

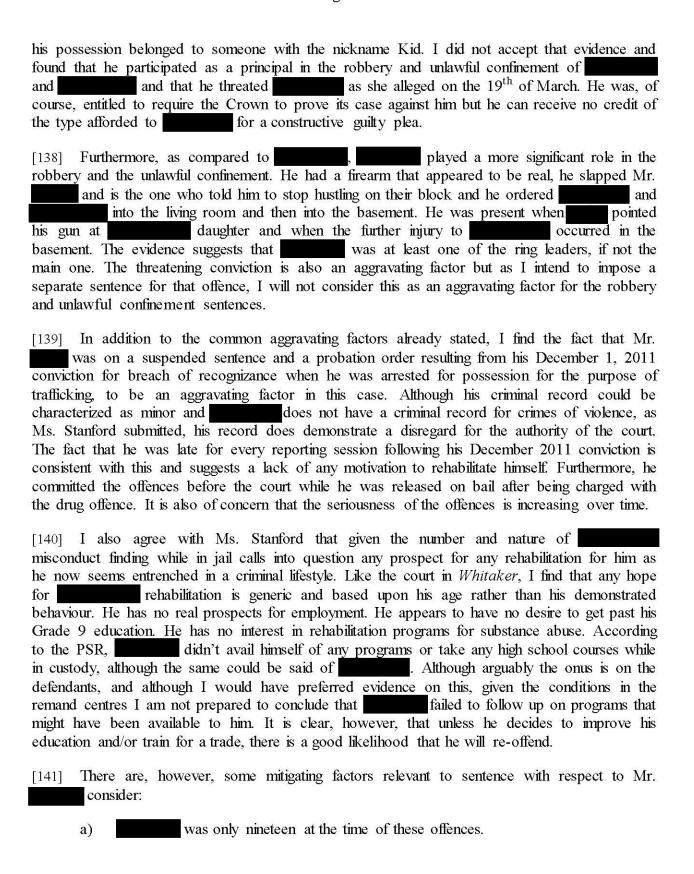
I am not persuaded that a reformatory sentence, even with the pre-sentence custody would adequately reflect the gravity of this offence, the offender's degree of responsibility nor would it be consistent with the purposes and principles of sentencing. On this record I cannot conclude in terms of the 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.

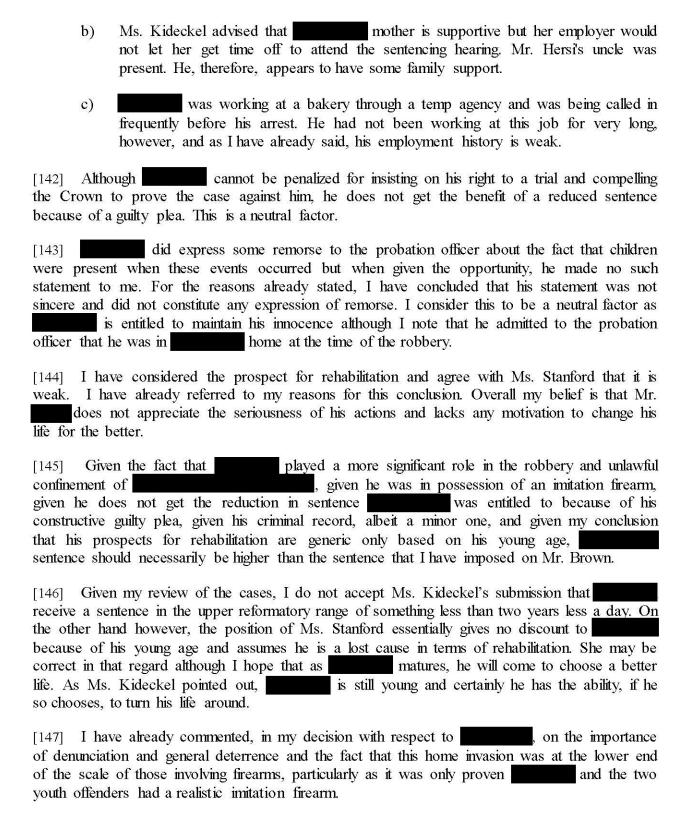
I agree with the observations of Justice Durno although as I have said, I find the circumstances of the home invasion robbery in his case to be more serious than the case at bar, particularly in so far as is concerned. In considering all of the cases referred to me, the submissions of counsel and the aggravating and mitigating factors that I have set out, I have come to the conclusion that a fit sentence for Mr. 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, 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 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 <i>Wright</i> .
Determination of a Fit Sentence for
[136] I turn then to my determination of a fit sentence for . I begin by considering his role in the robbery and unlawful confinement of .
[137] Mr. conceded nothing during the trial and fought all issues. He denied using the

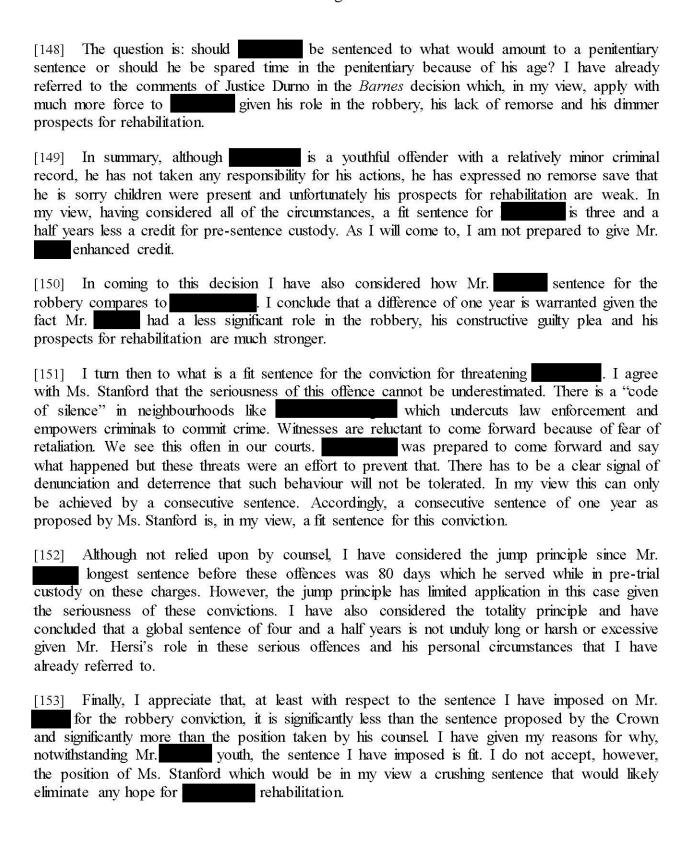
the position that Ms. was either mistaken or lying when she picked him from a photo line-

also denied making any threats to and testified that the phones found in

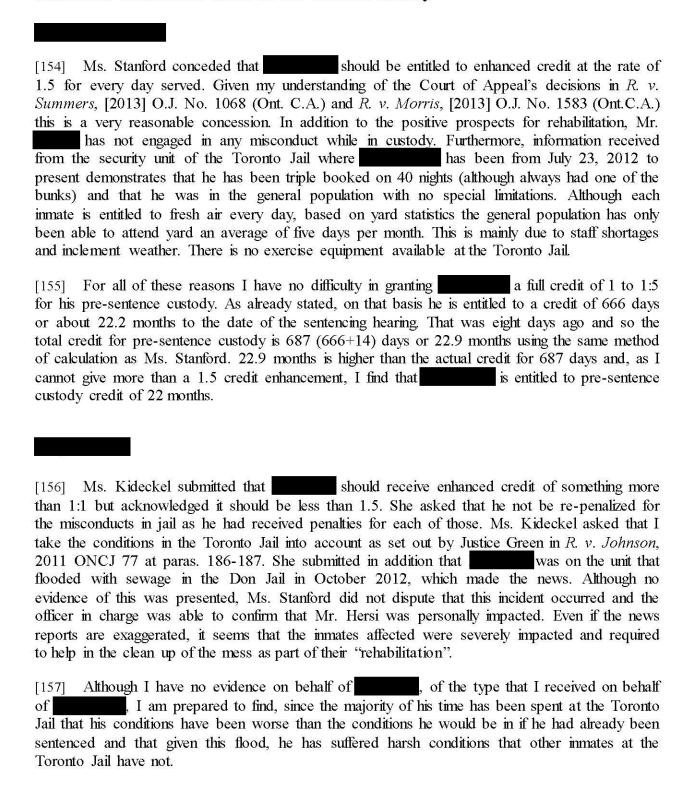
and denied participating in any robbery of

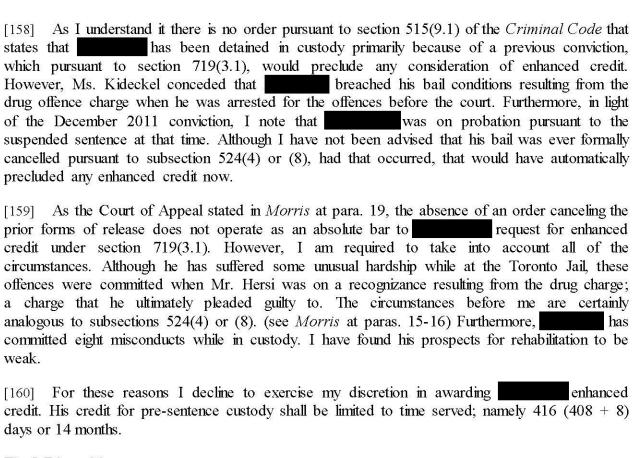






Entitlement to Enhanced Credit for Pre-Sentence Custody





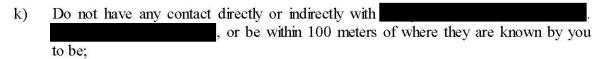
Final Disposition

[161] would you please stand.

- [162] With respect to your convictions for robbing and and 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 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;



- Do not have any contact with, or be in the company of, or associate with:
- 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] 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.

[169] would you please stand.

[170] With respect to your convictions for robbing and 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 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 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 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. 2013 ONSC 3321 COURT FILE NO.: 12-40000535-0000 DATE: 20130627

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

- and -

and

REASONS FOR SENTENCE

SPIES J.

Released: June 27, 2013

Edited Decision Released: July 2, 2013