CITATION: R v. Patten and James, 2024 ONSC 1737
COURT FILE NO.: CR-23-50000040-0000
DATE: 20240402

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
HIS MAJESTY THE KING	*Alice Bradstreet*, for the Crown
- and -	
CHAVES PATTEN and RUSHSEAN JAMES	*Barry Plant*, for Chaves Patten
Defendants	*Christian Levien*, for Rushsean James
	HEARD: February 16, 2024, at Toronto, Ontario

Michael G. Quigley J.

Reasons For Sentence

1. Introduction

[1] On January 31, 2023, Chaves Patten and Rushsean James were convicted by a jury of the violent armed home invasion robbery of a residence in Etobicoke, in north-west Toronto. The house was in an upscale residential neighborhood, on the streetcorner of Persimmon Court and Lafferty Street. Mr. Rainer Fernando lived there but the residence belonged to Mr. Fernando's parents.

[2] Initially, four co-accused were charged jointly: (i) these two accused; Chaves Patten and Rushsean James, and (ii) two other individuals; Ohaje Taitt, and Emma Hinch. The four of them were charged with conspiring together and committing this armed robbery at the residence of the complainant, Mr. Fernando, on March 10, 2020.

[3] Mr. Taitt pled guilty after the preliminary inquiry and prior to trial. He was sentenced to a penitentiary term of seven years. Sadly, Ms. Hinch passed away after the

preliminary inquiry but before trial, likely from a drug overdose. Only these two accused proceeded to trial.

[4] The jury found Mr. Patten guilty of seven offences. Mr. James was found guilty of four offences. At this sentencing hearing, both Mr. Patten and Mr. James were arraigned on a separate indictment, to which it was agreed the evidence from trial would apply. On that basis, in addition to the jury's findings, I found Mr. Patten guilty of seven further Fail to Comply offences, and Mr. James guilty of one Fail to Comply offence.

[5] In the result, Mr. Chaves Patten is before this court to be sentenced for the following offences:

Count	Offence	Criminal Code Section
2	Conspiracy to Commit Robbery	465(1)
4	Robbery with a firearm.	344(1)(a.1)
5	Discharge with Intent	244(2)(a)(i)
7	Possession of a loaded prohibited or restricted firearm	95(2)(a)
8	Assault causing Bodily Harm	267(b)
9	Disguise with Intent	108(2)(a)
11	Occupy a motor vehicle with a Firearm	94(2)(a)
FTC 1-2	Fail to Comply with Release – House Arrest (x 2)	117.01(1)
FTC 3-6	Fail to Comply with Release – Weapons (x4)	117.01(1)
FTC 7	Fail to Comply with Release – Curfew	117.01(1)

[6] Mr. Rushsean James is before this court to be sentenced for the following offences:

Count	Offence	Criminal Code Section
1	Conspiracy to Commit Robbery	465(1)
3	Robbery with a firearm.	344(1)(a.1)
6	Possession of a loaded prohibited or restricted firearm	95(2)(a)
10	Occupy a motor vehicle with a Firearm	94(2)(a)
FTC 8	Fail to Comply with Weapons Prohibition	117.01(1)

[7] The question before the court is the fit sentence in all the circumstances for each of these offenders.

2. Circumstances of the Offences

[8] Stated simply, Mr. Fernando knew Ms. Hinch. She was there with him at his house late that evening as his guest, but unknown to him, she was the 'insider'. Rushsean James was the driver of the getaway car. Chaves Patten and Ohaje Taitt were also in that car, both armed and masked. Mr. James drove them from Brampton to this specific location in Etobicoke. Mr. Patten and Mr. Taitt exited Mr. James' vehicle. Once Mr. Patten and Mr. Taitt gained entry to the residence through Ms. Hinch, who waved them in while Mr. Fernando was taking a bathroom break, they violently pistol-whipped, and robbed Mr. Fernando.

[9] As this was happening, another vehicle, a BMW, drove up beside and fired shots at Mr. James' vehicle, the Chevy Cruz getaway car. Mr. James barely missed being hit. He ran away from the scene as fast as he could in a southerly direction, as captured on one video surveillance camera. Ms. Hinch appeared to hide in a driveway north of the Fernando house off Lafferty Street, Mr. Patten fled the house, with Mr. Fernando chasing him. As he chased Mr. Patten out of the home, at the foot of the driveway Mr. Patten turned pointed a firearm at him and fired, narrowly missing Mr. Fernando. Mr. Patten then fled on foot. Mr. Taitt secreted briefly in the house, and then while this was ongoing, exited, got into the Porsche SUV in the driveway, and drove away. Another connected series of gunshots were fired down the road near Burnamthorpe Road, also involving the Porsche

[10] Police ultimately attended the scene and located numerous items belonging to and/or identifying the accused, including a cell phone associated to Mr. Patten, as well as Mr. James' glasses and identification on the ground beside his vehicle which he abandoned. Some 16 empty shell casings were found on the driveway and the two streets that bordered the residence. There was video surveillance camera evidence from three cameras around the house: one at the front door, one overlooking the driveway, and one overlooking the backyard towards the street. The entire event is captured on video, except for the second or two of uncovered territory bordering Lafferty on the side of the Fernando house.

3. Circumstances of the Offenders

[11] Enhanced Pre-Sentence Reports (EPSR's) were prepared by two very experienced social welfare members of the Sentencing and Parole Project, Ms. M. Richards for Mr. Patten, and Ms. J. Pemberton for Mr. James.

(i) Chaves Patten:

[12] Mr. Patten is 27 years old and was born in Jamaica. He is the only child born to Dezeree McCallum-Patten and Glenrick Patten. Mr. Patten has an older sister born to his mother's previous relationship, and six older paternal siblings who reside in Jamaica. He

is a Black man of Jamaican ethnicity. He is the father of three children, a 7-year-old daughter and two sons ages 5 and 6.

[13] His mother, Ms. McCallum-Patten is 56 years old and was born and raised in Jamaica. When she was 25 years old, she married Glenrick Patten, a hard-working, kind-hearted and well-respected man in their community. During the early years of their marriage, she worked in retail and Glenrick opened up the first of two restaurants. After Chavez was born when she was 29 years old, Glenrick opened the second restaurant. She worked full-time by day and assisted in running the restaurants at night, and then after 10 years, left the retail sector and helped manage the restaurants full-time.

[14] Their family life was good. Sadly, Glenrick Patten died in November 2006 when Chavez was 10 years old. He had gone out on a brief errand and was killed in a terrible car accident. She and Chavez both cried and mourned, and Chavez also spent many years denying his father's death. Their lives changed permanently.

[15] Before his father died, Mr. Patten's early years in Jamaica were very positive, but that ended following the death of his father: he said "it was very bad, he was my right hand, I was always with him". Greedy members of his father's family wrestled control over the businesses and money away from his mother. She became very concerned for their safety, and they abandoned their home and fled that community within days after his death. They lived with friends for a year, until her brother sponsored them to Canada. Ms. McCallum-Patten and Chavez arrived in Canada in September 1997, when he was 11 years old.

[16] Settlement in Canada caused considerable hardship for many years. He was hoping for a better life happy in Canada, but life as a new landed immigrant was more difficult than he anticipated. They settled initially with family members but were mistreated and had to leave. They were "barely surviving" because his mother could not find work, even while those family members were demanding that she pay rent.

[17] Ms. McCallum-Patten worked in a series of rough jobs before she received confirmation of their immigration status. She was subjected to anti-Black racism that caused her, in one case, to leave a position after just one-day's work. She was "treated like dirt" by the white staff and supervisors, while her white colleagues were treated with respect. Things started to stabilize when she started work as a caregiver. She began a nursing and Personal Support Worker (PSW) program. She attended school by day and worked at night for three years. Her work and school schedule left Chavez without supervision.

[18] Mr. Patten described his behaviours - poor school attendance and anger - as "acting out". He started getting into trouble and forming friendships with people who were "bad". Mr. Patten believed that their lives would have been different had his father not died. He was angry about the state of their lives.

[19] Shanae Keith has known him since they were about 15 years old. She is the mother of Mr. Patten's five-year old son. She observed that he was frequently alone due to his mother's work schedule, which made him susceptible to picking up "bad company". He did not choose his friends well. Mr. James, his co-accused in this matter was one long-time friend with a lengthy criminal history.

[20] Anti-Black racism was the most difficult part of Mr. Patten's Canadian education and schooling experience as it persisted throughout and excluded him from enjoying a positive learning experience. He was relegated to a lower cadre of students considered to have learning difficulty, the majority of whom were racialized. He was kicked out of school in Grade 10 for fighting and non-attendance.

[21] At his next school, there were three Black educators but instead of attending class, Mr. Patten hung out with other Jamaican youths who shared their experience of immigration and anti-Black racism and engaged in daily cannabis and alcohol use. He was eventually kicked out of that school as well for fighting and non-attendance.

[22] He discontinued his education in Grade 11. Continuing to associate with "the wrong crowd" led to his early adult involvement in the criminal justice system. Alcohol and cannabis gave him some relief from the pain of his father's death, the re-settlement, and their financial struggles. He began to drink very heavily but is happy to now be living without cannabis and alcohol while in detention. He intends to leave that life behind.

[23] Mr. Patten expressed remorse for his actions, "I am very sorry for the things I did". He stated that his involvement in this home invasion was rooted in greed. He wanted things for himself and his children. Ms. Keith believes that Chavez's path into criminality is rooted in the hardships he experienced - his father's death, leaving Jamaica, struggling in Canada, being alone and the desire for material possessions, but she rejects his choices. She asked, "at what cost are you going to provide for your family?"

[24] So, in summary, Mr. Patten's early years of life in Jamaica were idyllic until the age of 10. He went from being raised in a loving, financially secure family context to experiencing the sudden death of his father in a tragic car accident, the upheaval of re-settling in Canada, and the poverty that came with it. Ms. Richards, the author of his report, notes that accepted research shows that the loss of such an important attachment figure is considered 'one of the most emotionally distressing, and psychologically disruptive events that an individual may encounter', as was the case for both Mr. Patten and his mother.

[25] By the time he was in Grade 11, Mr. Patten eventually dismissed education to focus on hanging out with friends, engaging in substance use and learning how to survive through criminality. These youthful decisions created the path to his adult circumstances and offered short-lived benefits. Mr. Patten's lifestyle choices led to him being a target of two near-death shooting events, to having a criminal record that may pose barriers to

future employment and having compromised his freedom. His three children are also without the presence of their father, an unfortunate outcome, given that Mr. Chavez himself believed that his life outcomes would have been better had his father not died. He faces sentencing for serious offences. Ms. Richards concludes, however, that his path into the criminal system was initially triggered by his family's experience of poverty, an issue that disproportionately impacts Black and racialized people.

[26] Finally, I note that Mr. Patten was employed with Murray Landscaping from May 2019 until November 2020, in pool maintenance and landscaping and was a well-regarded employee. This came to an end when he was detained in custody. This employer was hoping at that time to have him back. It is unknown if this would still be the case after he serves his sentence, but it does confirm that he has the prospects to be a valued employee.

(ii) Rushsean James

[27] I feel obliged at the outset to say that the ESPR prepared by Ms. J. Pemberton has an enormous level of detail that cannot possibly be reproduced in these reasons. Mr. James' EPSR is an exhibit on this sentencing, so, if there is any deficiency in my efforts to summarize its key aspects, I refer readers to the original.

[28] Rushsean James is a 33-year-old Black man of Jamaican descent. He has an older sister, Rochelle by the same parents, and an additional 8 siblings on his father's side. Mr. James and his 4-year partner, Maria Providence, share a son, Armani, who is 1.

[29] His mother, Donna Lee McFarlane is 62 years old. She was born in Jamaica. She migrated to Canada at 21 on the sponsorship of her then husband and entered as a landed immigrant. Unfortunately, she was detained upon her arrival in Toronto in 1983 when drugs she claimed to be unaware of were found in her luggage. Ms. McFarlane was charged with drug offences, convicted, and sentenced to 12 months in jail.

[30] Following her release, she remarried and had two children with Patrick Lowe: Rochelle and Rushsean. She lived in Toronto for 14 years, regularly travelling back and forth to Jamaica, but learned on her return from one trip that she was subject to a deportation order. She was deported to Jamaica in 1996 when Mr. James was 6.

[31] Everything changed. She left her children in the care of a good friend, Pauline Lawrence because she did not think their father was responsible. Ms. Lawrence later became their legal guardian in their mother's absence. Her deportation causes Ms. McFarlane deep sadness because she believes it played a key role in her son's outcomes.

[32] His father, Patrick Lowe was born in Jamaica and migrated to Canada when he was 23. He lived in Toronto with his mother and over time adjusted to life in a new environment but continued to see his children on weekends. Mr. Lowe has worked for

over 30 years in various roles with a The Fern Group company and is currently a warehouse supervisor. Mr. James and his sister Rochelle were close in age and protective of one another, but this changed with Mr. James's increasing involvement in the criminal justice system.

[33] While being raised by Ms. Lawrence, Mr. James developed a close relationship with a cousin, Aaron, who played a primary male figure role in his life. Mr. James' criminal involvements upset Aaron, yet he continued to be in contact while Mr. James was in custody. In 2019, when Aaron passed away in his sleep while Mr. James was in jail, he felt badly that he could not say goodbye or be a support to his family.

[34] Mr. James always enjoyed playing sports such as hockey, but he flourished in basketball. He was playing on a house league and rep team by grade 11 that afforded him opportunities to compete in the U.S. He stopped playing basketball in his late teens due to limited finances but has picked it up again more recently.

[35] Ms. Providence believes a primary factor in Mr. James's engagement in crime is that he felt "neglected" by not having his own parents involved in critical aspects of his life. She believes this sense of loss continues to hinder him. His sister, Rochelle, agrees. Their mother's deportation had a significant impact on him, and he struggled to develop as a young man.

[36] Becoming a father has changed his life and has given Mr. James a bigger purpose. Ms. Providence is a mother of 4 boys, and their son, Armani is the youngest. Evidently, he is a very good father to their son and her older children and is very supportive of her, and she depends on him for caregiving and financial support as she attends college full-time. They both worry about the separation that he will experience and the adjustments and external supports that will be required in his absence while serving his sentence.

[37] Mr. James grew up in different neighborhoods in Toronto and Peel Region, first, around Jane Street and Trethewey Drive, a high-crime area where gang activity, gun violence and drug dealing occurred. At the end of middle school, he relocated to Brampton when Ms. Lawrence purchased a home. Towards the end of Grade 12, he moved in with his father in the Driftwood community near Jane and Finch in Toronto, where the same concerns prevailed about criminal activity.

[38] Due to his father's steady work schedule, he did not see him regularly. He veered off and began smoking cannabis, hanging out with friends, and partying. He became focused on acquiring fashionable clothing and jewelry. Fulfilling these wants led him to get into trouble as a youth. He believes he might not have interacted with the criminal justice system if he had more support from his father.

[39] At the age of 18 or 19, Mr. James moved back to Brampton, and began to sell drugs to stay afloat. He admits that his circumstances prompted him to engage in criminal

behaviour to make ends meet. He admits his negative outcomes were related, both to the bad company he kept and the poor life choices he made.

[40] He has worked in a variety of roles, but during his house arrest bail, has been working with his father at The Fern Group Ltd., where he has occupied several different roles. He is now certified to drive a forklift, a skill that will open other opportunities in the future. It has also provided stability to his life. He hopes to return to college to complete the program that he began in 2022 and would like to work with children to develop programming for them.

[41] Mr. James began to experience negative police interactions when he was 11. On one occasion while a police officer was searching the area for a suspect, he pointed his firearm at Rushsean's face when he was on his way to school. He had numerous negative contacts with the police in Peel Region and was carded. Interactions with the police usually became hostile because of the way the officers approached and spoke to him. He was regarded as suspicious because of his Black identity, style of dress and hairstyle, He feels "on edge" when in their presence. He believes the police abuse their power and get away with misconduct towards Black and racialized people.

[42] Mr. James went from suspensions in elementary and middle school for fighting, to improving in Grade 6 and 7, when finally taught by a Black teacher, and successfully completed high school in 2010 obtaining grades in the B to B+ range. In January 2021, he attended Sheridan College, but was dismissed for plainly race related reasons. He felt targeted by the college and identified their actions as another form of racial profiling.

[43] In January 2022, he was accepted into 5 programs at Seneca College. He chose the Child and Youth Worker program, achieved excellent grades, and was placed on the President's Honour List for his academic achievement.

[44] Mr. James has prior convictions for Possession for the Purpose of Trafficking and Possession of a Prohibited Firearm. He claims to have learned from his offending behaviour that making money more slowly but legally is much better than making fast money illegally.

[45] Ms. Providence believes that his peer associations and need for financial security led him to engage in crime, but he is no longer focused on criminal behaviour and is hoping that he will get another chance to rehabilitate himself. She believes that Mr. James is on a good path now, and with constant guidance she knows that he can have a successful life.

[46] Since being released on bail, Mr. James has been totally compliant and enjoys the simpler aspects of life such as being with his son or watching television shows. His family and support group see great promise for him, and the potential to be a good person who can make the changes to his life that will be needed to keep him away from criminal

trouble. Once his sentence is completed, they believe he will be able to rebuild his life and become a greater man.

4. Victim Impact Statements

[47] In this case, there were multiple firearms used. Mr. Fernando was seriously injured when he was pistol whipped and could have been killed if Mr. Patten was a better shot. It is understood Mr. Fernando has his own antecedents with the law, was not a voluntary witness, and has not provided an impact statement, but I feel safe taking judicial notice that of course these events would have impacted him: (i) that his family home, where he lived, sometimes with his parents, was invaded in such a planned and deliberate manner; and (ii) that he would have been seriously impacted by the injuries that he sustained and the loss of valuables. I find that there would have been substantial impact on Mr. Fernando, despite the absence of a victim impact statement from him.

[48] Crown counsel tendered a number of victim impact statements from the neighbours that lived in that community, on Lafferty Street and Persimmon Court, and each and every one of them spoke of being fearful and of the inability to sleep following these events.

[49] They fear that the neighbourhood that attracted them and that they once saw as a very quiet and safe place to live and raise families, was now the location of an all-out shootout in the middle of the street. The reality of their fear and the impact of these events is confirmed by none of them being willing to identify themselves. These are completely and entirely innocent victims in these offences, yet their lives are changed.

[50] It is clear that that these events on March 10, 2020, had great impact on many of the people who live on that street. No one was killed, despite the location of 16 shell casings on the ground in the vicinity, and the only injury was to Mr. Fernando, but these people have been injured permanently in a much more subtle but frightening way. These people can no longer feel their “home is their castle”, a safe place, because the fact that these events shattered that calm and quiet permanently, will not soon be forgotten.

Positions of the Crown and Defence

[51] For Mr. Patten, the Crown seeks a global sentence of twelve (12) years: eight (8) years for the armed robbery and the mandatory minimum five (5) year sentence for discharging a firearm with intent, a four (4) year concurrent sentence for possession of a loaded firearm, and a one (1) year sentence concurrent to one another, but consecutive to the other sentences, for the seven failure to comply offences. This totals 14 years, but Crown counsel reduces it to 12 years based on principles of totality and proportionality.

[52] For Mr. James, the Crown seeks a global sentence of nine (9) years, that is, eight (8) years for the principal offences plus a one-year sentence, consecutive to any other

sentence, imposed for the failure to comply with a weapons prohibition order. Crown counsel acknowledges she seeks the same sentence for Mr. James on the robbery as for Mr. Patten, even though Mr. James never got out of the car and did not discharge a firearm but grounds that in Mr. James' criminal record. Just two years before, Mr. James had been convicted of possession of a loaded firearm.

[53] Counsel for Mr. Patten advocates for a total global sentence of six (6) years for the offences, followed by a period of probation. He acknowledges that the applicable range for Mr. Patten should be eight (8) to ten (10) years, but suggested a lesser sentence is called for to reflect important mitigating principles relevant in Mr. Patten's circumstances.

[54] Counsel for Mr. James advocates in all the circumstances, for a total global sentence of five (5) years for the offences, recognizing the five-year mandatory minimum that applies to robbery with a firearm. He says the other offences should receive one (1) year concurrent. While he acknowledges that fail to comply sentences are served consecutive to the principal offences as a distinct and separate delict, in his submission there was no evidence that Mr. James ever handled a firearm, and that the evidence shows he never went into Mr. Fernando's house.

[55] All parties agree that ancillary orders should go requiring both offenders to supply a sample of their DNA and prohibiting both offenders from possessing weapons for life.

[56] Counsel for both offenders agree that both should receive credit for time served, pursuant to *R. v. Summers*, 2013 ONCA 147. They also agree that some credit should be given for the difficult detention conditions experienced by Mr. Patten while incarcerated at Maplehurst Corrections Centre and Mr. James when initially held without bail, and during an extended strict period of house arrest, pursuant to *R. v. Duncan*, 2016 ONCA 754.

5. Legal Principles

(i) Principles and Purposes of Sentencing

[57] Messrs. Patten and James (along with Mr. Taitt) planned and executed a violent home invasion. Emma Hinch was involved as the person who would permit entry into the home. She provided the address to the group and opened the door for them when they arrived. Patten and his former co-accused, Mr. Taitt, armed with firearms and their faces masked entered the home and kicked down the bathroom door to find the victim. They pistol whipped him. They stole jewelry. They stole cash. Blood was everywhere.

[58] As Mr. Patten ran out of the home to the driveway, he turned and shot at the victim, narrowly missing him. Mr. James was confronted by a group of men with firearms, and

they shot at him as he ran from the getaway vehicle. This was a well-orchestrated plan – until the unexpected happened.

[59] Section 718 of the *Criminal Code* states the fundamental purposes of sentencing and lists its underlying objectives. The fundamental purpose of any and every sentence is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by the imposition of just and appropriate sanctions. Among the specific objectives listed in s. 718 of the *Code*, the most important in this case are deterrence, specific and general; the denunciation of unlawful conduct; the protection of the public; and the separation of offenders from society where necessary. That said, rehabilitation is always an important sentencing objective, and this is especially true in circumstances where the *Morris* factors are in play. That calls upon the court to balance that factor against the need for a strong message of deterrence and denunciation, within the social context of these offenders' lives.

[60] Sections 718.1 and 718.2 also contain important objectives relevant in this case. The test of proportionality requires that the sentence speak out against the offence, but it must not exceed what is just and appropriate given the moral blameworthiness of the offender and the gravity of the offence, as compared to other offenders and the circumstances of their crimes. Taken together, with s. 718.2(b), the court must strive to ensure that the sentence imposed respects the principles of proportionality and consistency of sentences for similar offences in similar circumstances: see *R. v. Nasogaluak*, [2010] S.C.C. 6.

[61] Just as an aboriginal offender's moral blameworthiness may be reduced because of the direct impact on the offender of the systemic and historic subjugation of Aboriginal peoples, as described in *R. v. Gladue*, so too the moral blameworthiness of these two offenders may be reduced because of the direct impact their experience dealing with systemic racism in Canada has on the social context within which these offences were committed. This social context is fully described in the ESPRs for each of the offenders.

[62] Subject to specific statutory rules, however, the determination of a fit sentence is always an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case. No one sentencing objective supercedes the others and the relative importance of aggravating or mitigating factors will push a sentence up or down on the scale of appropriate sentences for similar offences.

[63] The Crown correctly submits that the principles of denunciation and deterrence are the primary considerations for this Court in a home invasion armed robbery, as approved by the Ontario Court of Appeal in *R. v. Wright*, [2006] 83 O.R. (3d) 427. Likewise, it is well established that deterrence and denunciation are the primary sentencing considerations for offences involving firearms. At para. 13 of *Wright*, the court states:

> Home invasion is a serious, and increasingly prevalent, crime in our society. For a discussion of its essential nature and the variety of circumstances "home invasion" can embrace, see *R. v. S. (J.)* (2006), 210 C.C.C. (3d) 296 (Ont. C.A.). The crime committed by Mr. Wright constitutes a home invasion because it was characterized by the invaders' forced entry into the victims' home for purposes of committing a theft or robbery, knowing that (or being reckless as to whether) the home was being occupied, and by the accompanying use or threatened use of violence with guns, together with the confinement of the occupants of the home.

[64] In *R. v. Soares*, [1996] O.J. No. 5488 (Ont. Gen. Div.) at para. 286, referenced at para. 14 of *Wright*, Trafford J. of this court eloquently explained why stiff sentences are called for in home invasion robberies:

> The sanctity of one's home is of fundamental importance in a free and democratic society. It is constitutionally recognized in our country. Everyone must not only be, but feel, secure in their residence. A society that tolerates significant criminal intrusions into the privacy of one's home is a society that forces it citizens to resort to self-help to protect themselves against such wrongs. Absent effective responses from the judiciary, the alternative is for citizens to arm themselves in anticipation of a need to defend themselves against such criminal enterprises. A society like that is not ours today, has not been ours in the past, and will not be ours in the future. The obligation of the Court is to give proper recognition to the sanctity of the home, to protect all citizens against such intrusions, and to thereby preserve the public's confidence in the administration of justice.

[65] It is for these reasons that a stiff penitentiary term is generally warranted upon conviction for a home invasion offence subject only to the mitigating effects of the *Morris* factors that are relevant to determining a fit sentence for each of Mr. Patten and Mr. James, and their entitlements to credit under *R. v. Summers* and *R. v. Downes*.

(ii) Principles of sentencing a first-time and youthful offender

[66] In determining the fit sentence for Mr. Patten, I am also mindful of the fact that he is a young man who had no criminal record before these offences arose. He is presently serving another subsequent sentence in detention, but this will be Mr. Patten's first penitentiary sentence. The Court of Appeal has said that a "first penitentiary sentence should be as short as possible": *R. v. Borde* (2003), 172 C.C.C. (3d) 225 (Ont. C.A.). The length of a first penitentiary sentence for a youthful offender should rarely be determined solely by objectives of denunciation and general deterrence.

[67] In *R. v. Priest* (1996), 110 C.C.C. (3d) 289 (Ont. C.A.) at pp. 294-295, Rosenberg J.A. stressed that the primary objectives in sentencing a first offender are individual deterrence and rehabilitation. Community-based dispositions are to be considered first, but there is no suggestion here that a non-custodial sentence would be appropriate.

Counsel agree that a custodial sentence is appropriate and necessary. Nevertheless, 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.

[68] In the more recent decision in *R. v. Brown*, 2015 ONCA 361 (Ont. C.A.), however, while the accused was a young first-time offender, he had participated in an extremely violent home invasion for which a lengthy penitentiary term was called for. The court confirmed that the "range for home invasions is four to five years at the low end, and up to 11 to 13 years at the high end," but at para. 5 also reaffirms that:

> …while individual deterrence and rehabilitation are the primary objectives in sentencing a first offender, the importance and weight of other factors increase with the seriousness of the crime. This approach respects the fundamental principle of sentencing stated in s. 718.2 of the Criminal Code: "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

[69] The trial judge had imposed a sentence of seven years for convictions on robbery, robbery with a firearm, and aggravated assault, three years concurrent for uttering threats, three years concurrent for forcible confinement, and two years consecutive for the unlawful possession of a firearm, resulting in a total sentence of nine years. Recognizing the range for home invasions set in *Wright*, above, the court found the sentence to be fit, but reduced it from 9 years to seven since the unlawful possession offence under s. 91(1) did not require a consecutive sentence. At para. 10, the court concludes:

> We would vary the sentence by making the sentence for unlawful possession of a firearm concurrent to the other sentences thereby reducing the appellant's total sentence from nine years to seven years <u>to properly reflect that individual deterrence and rehabilitation remained the paramount factors on his sentencing</u>. [Emphasis added]

(iii) Principles relating to social context – *Morris* factors

[70] As a starting point, it is now fully accepted that the decision in *R. v. Morris*, 2021 ONCA 680, [2021] O.J. No. 5108, and the decisions in numerous cases decided since then, inform the proposition that I must, at the outset, make a frank acknowledgement of the existence of and the harm caused by systemic anti-black racism, generally, and as it pertains to these two offenders. I am called upon to consider these factors in mitigation.

[71] It is clear from the EPSR report not only that Mr. Patten was directly affected by systemic racism, but also that life has been very difficult for him since the death of his father. However, Crown counsel suggested that while very helpful in understanding who Mr. Patten is and what his life was and is like, the report provides less context to explain why Mr. Patten armed himself with a firearm that night and chose to invade Mr.

Fernando's home and inflict the injuries he did. Crown counsel submitted it did not provide the added layer of explaining away some of this behaviour.

[72] She submitted the same was true of Mr. James. His ESPR makes plain that anti-black racism has affected him. The deportation of his mother is heart wrenching and the absence of his father in his young upbringing certainly had significant consequences on his development. At six years of age, Mr. James had to endure being ripped away from his mother, to stay in Canada with his sister under the care of a close friend of his mother. While his father was in Canada, he was only intermittently involved with his son during his young life, certainly not as much as I'm sure he would have hoped for. Those two events, or perhaps better stated, omissions, had very significant consequences for Mr. James, and it is clear that anti-black racism played a part in that.

[73] As in Mr. Patten's case, however, it is said to help understand who Mr. James is and how he came to be who he is, but Crown counsel submits it is less useful to explain why Mr. James drove two other armed men to another town to commit a home invasion.

[74] However, the purpose is not to excuse the conduct, and it need not be to explain a direct link between the background and the specifics of the offence, but rather to explain its social context. It is to show that both offenders have been subjected to systemic racism throughout most of their lives, as well as extremely negative life altering events and disadvantages. It is proferred in support of balance between deterrence and denunciation, moral culpability, and the rehabilitative prospects of these two individuals. It serves that function within the context of the mandate explained at para. 61 of *Morris*, that proportionality is the fundamental and overarching principle of sentencing, measured by reference to both the offence and the offender: see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 40; *R. v. Friesen*, 2020 SCC 9, 391 C.C.C. (3d) 309, at para. 30.

[75] At para. 66, the court references *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 at para. 12, where the majority again emphasized that:

> [P]roportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task.

[76] Looked at from that perspective, the role of social context evidence in the circumstances of sentencing offenders like Mr. Patten and Mr. James becomes clear. In *Morris*, Tulloch J.A. as he then was, explains at paras. 79-81 that:

> 79 The social context evidence can, however, provide a basis upon which a trial judge concludes that the fundamental purpose of sentencing, as outlined in s. 718, is better served by a sentence which, while recognizing the seriousness of the offence, gives less weight to the specific deterrence of the offender and greater weight to the rehabilitation of the offender through a sentence that addresses the societal disadvantages caused to the offender by factors such as systemic racism.
>
> 80 Blending the various objectives of sentencing is the essence of the sentencing process. There is seldom one and only one fit sentence. As long as the sentence imposed complies with the proportionality requirement in s. 718.1, trial judges are given considerable discretion to decide how best to blend the various legitimate objectives of sentencing. If trial judges operate within that band of discretion, the different weight assigned to different objectives may produce different but nonetheless equally fit sentences.
>
> 81 In the present case, the social context evidence provided a basis upon which the trial judge could give added weight to the objective of rehabilitation and less weight to the objective of specific deterrence. By doing so, the trial judge would not diminish the seriousness of the crime but would recognize that the ultimate sentence imposed must be tailored to the specific offender and the potential rehabilitation of that offender. As long as the sentence ultimately imposed remains proportionate to the offence and the offender, the actual sentence imposed would be a fit sentence.

[77] While I accept Crown counsel's advocacy in favour of a more direct link between the social context evidence and the specific crime, as was the case in *Morris*, in its summary, at paras. 106-107, the court explains that is not the only purpose for which such evidence will be admitted:

> 106 In summary, social context evidence, which helps explain how the offender came to commit the offence, or which allows for a more informed and accurate assessment of the offender's background, character and potential when choosing from among available sanctions, is relevant and admissible on sentencing. Acknowledging the reality of anti-Black racism and its impact on offenders like Mr. Morris during the sentencing process enhances the legitimacy of the criminal justice system in the eyes of the community and, in particular, those in the community who have good reason to see the criminal justice system as racist and unjust. A sentencing process which frankly acknowledges and addresses the realities of the offender's life takes one important step toward the goal of equal justice for all.
>
> 107 We see nothing new in the approach to sentencing described above. It reflects the individualized offence and offender-specific approach to sentencing that has always held sway in Canadian courts. The sentencing process, as it exists, can properly and fairly take into account anti-Black racism and its impact on the offender's responsibility, and the selection of an appropriate sanction in all the

> circumstances. What is new is the kind of information provided in reports like the two filed in this case and a judicial willingness to receive, understand, and act on that evidence. (Emphasis added)

6. Analysis

(i) Findings on Appropriate Range

[78] There is little disagreement between counsel on the applicable ranges that should apply here but the range is broad: from a low of 4 years to a high of 13 years for a home invasion armed robbery, writ large: see *Wright*, above. It is the placement of these offenders on that continuum that is the more difficult task.

[79] Crown counsel's request for 8 years for the armed robbery, plus the 5-year mandatory minimum for discharging the firearm consecutive, and 1 year for seven fail to comply offences, again consecutive would have exceeded that 13-year range in Mr. Patten's case, but she reduced her requested sentence to 12 years based on principles of totality, before credits. She also uses Mr. Taitt's sentence of 7 years, but on an early plea, as a differentiation and explanation for the lengthier sentences sought here.

[80] Mr. Patten's counsel takes the position that the applicable range for him should be 8 to 10 years, but he advocates that a lesser sentence of 6 years is called for to reflect important mitigating principles relevant in Mr. Patten's circumstances, largely relating to *Morris* factors.

[81] For Mr. James, Crown counsel seeks the same eight-year sentence for the robbery that she seeks for Mr. Patten, plus one year consecutive for the violation of the weapons prohibition imposed upon him two years ago, for a total of nine years before credit. Mr. James's counsel instead advocates for a lower sentence of six (6) years, for the reasons outlined above.

[82] To dispose of the easier issue first, I look first at the appropriate sentence for the fail to comply and breach of prohibition offences. It seems well settled that the breaches are separate delicts, distinct from the armed robbery and discharge firearm related offences.

[83] The issue is fully canvassed in the Court of Appeal's three decisions in *R. v. Houle*, 2008 ONCA 287, *R. v. McCue*, [2012] O.J. No. 6381 (C.A.), and *R. v. Claro*, 2019 ONCA 626, and in this court, in *R. v. Addow*, 2014 ONSC 3225 at paras. 29-35. Moreover, Parliament has made it clear in ss. 718.3(4), that consecutive sentences should be imposed when the offences do not arise out of the same event or series of events, or when different societal interests are engaged.

[84] In *Addow*, above, at para 29, I wrote (citations omitted):

> As a sentencing matter, the decision whether to impose consecutive or concurrent sentences relates principally to whether the offender is being sentenced for different convictions related to separate events and committed at different times. This is subject only to the modifying effect of the principles of totality and proportionality: see Renaud, *The Sentencing Code of Canada: Principles and Objectives*, where the author affirms that:
>
> > Separate events or transactions ought to result in consecutive sentences if the result is a total term that is not unduly long or harsh, and thus confirms to s. 718.2(c) and that does not offend the proportionality requirement of s. 718.1 of the *Criminal Code*.

[85] This position is reflected in *Houle* and *McCue*: both comment upon the circumstances where consecutive sentences can and ought to be imposed. In *Houle*, at para. 4, Laskin J.A. stated as follows:

> 4. It was also open to the sentencing judge to impose consecutive sentences for the firearms-related offences. The deference that is due the sentencing judge on matters of sentencing generally applies to the decision whether to make sentences consecutive or concurrent: R. v. McDonnell (1997), 114 C.C.C. (3d) 436 (S.C.C.). Although these offences were temporally linked, they constitute invasions of different legally protected interests. The sentencing judge was entitled to bring home the seriousness of the offences by imposing consecutive sentences for the firearms offences. See R. v. Gummer, [1983] O.J. No. 181 (C.A.). The principal of totality was also satisfied.

[86] In *McCue* at para. 20, the court observes in part:

> …A concurrent sentence denigrates the significance of the mischief charge and suggests that it is not in and of itself worthy of punishment. Of course, in fixing the appropriate length of a consecutive sentence, a trial judge must have regard to the totality of the sentences to be imposed. Totality concerns can, however, be adequately addressed by adjusting the length of the various consecutive sentences, if necessary.

[87] In my view, these authorities support the proposition that sentences for breaches of orders of the court ought to attract consecutive sentences, to be adjusted, if necessary, by the totality and proportionality principles. Counsel for Mr. James suggests he should receive only a brief, perhaps 6-month sentence for breach of his weapons prohibition order. In my view to bring home the seriousness of the offence of breaching a firearms prohibition order requires not only that the sentence be consecutive, but also that it be of 1-years duration. Mr. Patten's fail to comply offences are of less seriousness than the weapons prohibition offence, but there are seven offences. I find this fact invites the same sentence as I impose on Mr. James, that is, 1 year consecutive, in both cases, as requested by Crown counsel.

[88] Turning now to the more complex and difficult question of sentence relating to the principal offences, dealing first with Mr. Patten, I recognize that Crown counsel's position of 12 years has already been reduced from 14 based on totality principles. However, I do not accept that in all the circumstances of this case, a sentence of twelve years is called for in Mr. Patten's case. In my view, this overemphasizes denunciation, general deterrence, and the need to separate Mr. Patten from society.

[89] Crown counsel references Justice Kelly's sentence in *R. v. Owusu-Sarpong*, [2021] O.J. No. 5362 at para 41, but that is at the highest level because of the victims, and the particular circumstances. I do not think Mr. Fernando can be characterized as a vulnerable victim, and, as I have noted elsewhere, he appeared to know something was up that night. That was why he got his own firearm out of his car and made the phone calls that appeared to precipitate the arrival of the BMW and its shooters, there plainly to have a shootout with these four co-conspirators. The 16 shell casings located on the streets and nearby shows that is what happened.

[90] I also realize that Mr. Patten does not get the benefit of a plea at an early date, That is not the case here but given the sentence imposed upon Mr. Taitt, whose circumstances are otherwise similar if not the same as Mr. Patten's at least with respect to the offence, the additional 5 years consecutive seems punitive and excessively harsh.

[91] While I fully accept that Mr. Patten has committed very serious crimes, I also accept he is very remorseful, and tuned into the different channel his life needs to take going forward, that his risk of reoffending is at most in the low range, if that, and that as a first time offender, with very good rehabilitation prospects, I am required to impose the minimum sentence appropriate in the circumstances. I am also required to factor in his social context.

[92] In these circumstances. I believe a sentence in the range of 9-11 years would be a more appropriate starting point before applying *Morris* factors and before other credits. I base this in large measure on the Court of Appeal's decision in *R. v. Brown*, above, which is different, but where the Court dealt with a sentence appeal by a youthful first offender involved in a very violent home invasion and varied it down from nine years to seven years. and noting that the range for home invasions is 4 to 5 years at the low end, and up to 11 to 13 years at the high end.

[93] In the case of Mr. James, I believe and find the range applicable to him should also be lower than the nine-year sentence requested by Crown counsel. Despite his prior firearm related offence, I find that the quality of Mr. James's moral culpability is just not the same as Mr. Patten's, or Mr. Taitt's. It is lower, in my view, in the range of 7 to 9 years, but again, before applying *Morris* factors and before other credits.

(ii) Aggravating and Mitigating Factors

[94] Counsel for both offenders contend they were motivated solely by greed, but Crown counsel contends, correctly in my view, that there was more to it than simply greed. It makes no sense that greed was the sole motivator given that this developed as a planned and deliberate hit on this particular house in Etobicoke, with Mr. Fernando present inside, far from where the co-accused were resident in Brampton. The offence was not because of what was inside that was of value, it was that it was Mr. Fernando inside, and he was their specific target. Indeed, his time on the phone outside the house looking around furtively, and his actions arming himself with his own firearm from one of the cars in the driveway, certainly suggests he was apprehensive of something happening. Moreover, as noted, only Mr. Fernando could have called for the appearance of his friends in the BMW who arrive in the middle of the melee and started shooting at these co-conspirators, themselves. That was not mere coincidence.

[95] I accept the most likely story was that Mr. Fernando was their target, in what was obviously some sort of revenge action, instigated by the elusive rap man, Killa Da Crook, to remedy an insult or some perceived lack of respect. Mr. Fernando indicated that he and this Mr. Crook individual had some sort of issue, and it was his belief, at least, that Mr. Patten, Mr. James, and Mr. Taitt came at his behest. The parties obviously had conflict enough that these offenders who do not appear to have known Mr. Fernando before, would drive from Brampton to this specific home in Etobicoke to pistol whip this man. As well, however, it appears the plan would not have and did not originate from them, but rather at the instance of Mr. Crook. He had the goal and they tried to implement it on his behalf, and I expect with his instruction.

[96] While I accept this reasoning, much more logical than mere greed, I do not make that finding as an aggravating feature because it is not proven beyond a reasonable doubt. But the involvement and prompting of Mr. Crook is mitigating, and in my view, meets the required level of proof on a balance of probabilities. As such, in my view, modified by these findings, the aggravating circumstances in this case applicable to both offenders, include the following:

(i) The victim was viciously attacked in his own home.

(ii) There was planning and deliberation involved.

(iii) A getaway car was used to assist in a quick exit.

(iv) There were four people involved in this plan. One was already inside, and two more entered the home, outnumbering the victim.

(v) Multiple firearms were used.

(vi) The impact on the victim.

(vii) The impact on the neighbourhood has been overwhelming and is highly aggravating, with numerous residents, too fearful to identify themselves, identifying a constant sense of fear and continuing sleeplessness.

(viii) Mr. Patten and Mr. Taitt used gratuitous violence in beating Mr. Fernando with a firearm.

(ix) Mr. Patten was breaching three different bails at the time.

(x) Mr. James' has a criminal record. He was breaching a firearms prohibition at the time of these events.

[97] On the other hand, the mitigating circumstances in this case include the following:

(i) At the time of these offences Mr. Patten did not have criminal record (and obviously no prior firearm related offences).

(ii) At 27, Mr. Patten is a relatively youthful, first time (in the circumstances) offender.

(iii) Mr. Patten has already served approximately 24 months in custody on the Brampton matters. He has had a full taste of the imprisonment experience, as reflected in his remorseful and thoughtful letter to the court.

(iv) Since Mr. Patten has been subjected to systemic racism as well as other extremely negative, life altering events and disadvantages throughout most of his life, his circumstances call on the court to show restraint by applying the *Morris* principles in mitigation.

(v) Mr. Patten's prospects for rehabilitation remain very strong, as the EPSR indicates. He has used his time in custody well and wisely. Rehabilitation for such a relatively young man is mandated to be a significant consideration, and not only deterrence and denunciation. The principles of totality and proportionality must also be considered.

(vi) Mr. Patten has done exceptionally well in moving in a rehabilitative direction while in custody. He has completed high school with very high grades, illustrative of diligence and determination.

(vii) Both offenders have clearly accepted responsibility, and both have expressed remorse for their actions, not only to the authors of the ESPR's, but also directly to me in this court at the end of the sentencing hearing.

(viii) Mr. James also has done very well before and since the trial while remaining in the community, with ankle monitoring. In particular, he has been a caring father for a very young child, and has been working, without incident, to provide for his wife and child, and her other children.

(ix) In each of the two ESPR's, one for each offender, there are factors of systemic and anti-black racism that *R. v. Morris* calls upon to be considered in mitigation, not to excuse conduct but rather to create an understanding of the painful and systemic issues both offenders have experienced, each in his own way, and the context that creates within which these offences should be viewed. In my view, as I outline below, the *Morris* factors apply to both offenders, for reasons I will explain.

(iii) Conclusions on the fit sentences for these offenders

[98] Turning then to the evidence in this case, I find that the social context evidence elaborated on in both Mr. Patten's and Mr. James's EPSR's does provide me with a more informed and accurate assessment of the background, character, and potential of each of these offenders when choosing from among available sentencing sanctions.

[99] Mr. Patten was subjected to assumptions, rooted in anti-Black racism, about his alleged inability to speak English because of his Jamaican accent, yet Jamaica was a British island and English remains the primary language that is spoken. The research shows Black students with accents are often assessed to have English-learning needs (see James and Turner, 2017, p. 46). His first and only experience of belonging and acceptance in education came from the Black teacher that he had in Grade 11, but that came at a stage too late to stop his exit from education altogether. The combination of these factors contributes to the so-called "school to prison pipeline", a form of social exclusion that results in Black students being disproportionately pushed out of the education system and turning to crime (see James and Turner, 2017, p. 9).

[100] Mr. Patten's experience of anti-Black racism within the education system does not suggest he bears no accountability for his actions, past or present. He is responsible for his actions. He has plainly accepted responsibility for those actions. Rather, the information provides context on the impact of systemic factors in the life of Mr. Patten, and his response to them.

[101] In his EPSR, Ms. Richards concluded from her experience of working with individuals involved in the criminal system that this data highlights why crime is a more lucrative option for people seeking to reintegrate post-incarceration, especially since earnings typically may not exceed the minimum wage income that no longer supports daily living for many. Mr. Patten must contend with these realities if he is serious about exiting the cycle of crime and incarceration, but he has expressed willingness to take any

employment he can access as he has determined that it would be easier than risking his life and freedom again. Ideally, the process of rehabilitation will provide Mr. Patten with appropriate education and training that will enable him to achieve his goals. This sentence is the first step on that road.

[102] For Mr. James, his social history shows that loss, separation, and financial struggles have factored into his circumstances. His changed family dynamic altered his life from early childhood. The separation from his mother was damaging to him and has been identified as the primary factor that set him on a path of criminality.

[103] His EPSR shows that the issue of absent fathers is also a risk factor for youth to engage in crime. Ms. Pemberton reports from the research that an increased presence of Black fathers could influence Black youth to stay away from criminal behaviour. However, Mr. James' contact with his father was infrequent or at least irregular and by the time he moved back with him, he had already started to follow a negative path through his associations with peers.

[104] Numerous systemic influences may have impacted Mr. James's trajectory and experiences. Income inequality, poverty and unemployment disproportionately affect Black residents and have been linked to choices of violence and criminality as a means to support the financial needs of vulnerable populations. The EPSR author notes this resonates with this offender's circumstances, as he sought illegal ways to make money once he began to encounter barriers to secure legitimate employment.

[105] A further negative in his case relates to systemic racism from police. The different treatment accorded by police to blacks and white counterparts demonstrated to him the racial bias that exists within law enforcement. Mr. James experienced this as a child. His encounters with the police began at the age of 11 in his Toronto neighbourhood, and increased as he grew older and relocated to Brampton. He incurred criminal charges as a youth that heightened the contact he had with the police and the profiling he experienced. Research on the impacts of policing on Black, Indigenous and racialized youth note that racial profiling and over-policing are overt forms of racism that develop "tough demeanours" in young people, which can lead to increased conflict as they age.

[106] Both authors, eminently qualified, explained that Anti-Black racism within policing has been well researched and continues to cause 80% of Black Ontarians to feel targeted because of their Black identity. As well, the frequency of interaction of Black youth with law enforcement is an antecedent of racial profiling that subsequently leads to their over-representation in the criminal justice system. Mr. James's EPSR refers to Toronto Police Service (TPS) research from 2022 that revealed that Black men were overrepresented in "use of force" incidents when they encountered the police and were 2.3 times more likely to have a firearm pointed at them for no apparent reason.

[107] In my view, while recognizing the effects of their respective backgrounds on their moral culpability, and in the balance of specific deterrence, and rehabilitation, Mr. Patten's background was somewhat more difficult than that of Mr. James. Mr. James' circumstance of having his mother deported at the age of six was certainly traumatic, but in my perception, even so, he had more supports available to him than Mr. Patten had. In the result, the combined effect of being a first-time offender for these purposes, and his *Morris* factors results in me recognizing those mitigating factors somewhat more than in Mr. James' case.

[108] Like P. Campbell J. in *R. v. Tabnor*, 2021 ONSC 8548, altered for these defendants, I find that the extensive evidence above, which I have accepted, supports a conclusion that the offences that both offenders have been convicted of "are deserving of somewhat less moral opprobrium than similarly bad choices by a person who grew up in circumstances less shaped by racial bias and its consequences than [Mr. Patten's and Mr. James.]" As in that case, I adopt Justice Campbell's thoughtful conclusions, adapted to this case, as follows:

> Ultimately, knowing what I know of [Mr. Patten and Mr. James], [their] conduct, and the milieu in which [each of them] came of age, I cannot reach any conclusion but that the position [they]now [find themselves] in is the product of many antecedents. [Their own individual choices], which are major moral failings, are prominent among them but the blame to be assigned cannot be wholly separated from the setting in which [each of them] made those choices and that setting cannot be separated from the history of systemic racism which has played a part in shaping it [for both of them].

(iiv) Pre-sentence custody credit

[109] Chaves Patten was arrested on May 19, 2020, and charged accordingly. He was released on bail on June 16, 2020. On December 29, 2022, Mr. Patten was convicted on two Brampton charges and sentenced to 24 months in custody (in addition to pretrial custody since February 2022). He has remained in custody at Maplehurst Corrections Centre in Milton since then. Based on serving two-thirds, the sentence on the two Brampton charges would have allowed for a release date of approximately June of 2024.

[110] Mr. Patten's counsel and Crown counsel have agreed that Mr. Patten had 29 days of PTC at 1.5 credit for 44 days, plus 6 months credit for when he was on bail: a total of 7 ½ months pre-trial credit.

[111] The time that had been spent in pre-trial custody for Mr. James was a total of 97 days. Lockdown reports showed approximately 70% of his time in custody was spent on lockdown. That would result in approximately 180 days being attributed to time spent in

custody for Mr. James. In addition, Crown counsel and counsel for Mr. James agree that he spent two years out of custody while on an ankle monitor and during that time – initially he was released on rather stringent conditions – total house arrest. Ultimately, he was able to do some work still on an ankle monitor, but the parties agree that six months should be credited for that time. In short, it appears, and I find that Mr. James is entitled to have one year deducted from the sentence which I must soon impose upon him.

7. Conclusions and ancillary orders

[112] As I have emphasized, sentencing is an individualized process, and my duty is to impose a sentence on Mr. Patten and a sentence on Mr. James that is just and appropriate in each of their respective circumstances. After much thought, and before taking into account *Summers* or *Downes* credit, but after taking account of the circumstances of both the offence and both of these offenders, and the aggravating and mitigating circumstances for each of these offenders including *Morris* factors, I have concluded on the appropriate sentences for each of them.

[113] Mr. Patten, please stand up.

[114] Mr. Patten, I impose a sentence on you of a total of nine-years imprisonment. In imposing this sentence of nine years I am following the decision in *R. v. Brown* and am addressing individual deterrence and your good prospects for rehabilitation by imposing the shortest term of imprisonment that I find is proportionate to the crime and to your responsibility.

Count	Offence	Sentence
2	Conspiracy to Commit Robbery (s. 465(1))	Stayed: *R. v. Kienapple*
4	Robbery with a firearm (s. 344(1)(a.1)) (5 yr. MM)	8 yrs.
5	Discharge with Intent (s. 244(2)(a)(i)) (5 yr. MM)	5 yrs. concurrent to count 4
7	Possession of a loaded prohibited or restricted firearm (s. 95(2)(a))	4 yrs. concurrent to count 4
8	Assault causing Bodily Harm (s. 267(b))	2 yrs. concurrent to count 4
9	Disguise with Intent (s. 108(2)(a))	2 yrs. concurrent to count 4
11	Occupy a motor vehicle with a Firearm (s. 94(2)(a))	2 yrs. concurrent to count 4
FTC1-7	Fail to Comply with Release – House Arrest (x 2); Fail to Comply with Release – Weapons (x4); Fail to Comply with Release – Curfew (s. 117.01(1)	1 year for each, concurrent to each other but consecutive to count 4

[115] In the result, after pre-sentence custody credit of seven and a half months, I sentence you. Mr. Patten, to serve a remaining sentence of eight years and four and one-half months.

[116] Mr. James, please stand up.

[117] Mr. James, you do not get the benefit of the principles that apply to a first-time offender sentence. However, I am recognizing the difference in your participation in this offence, your lesser moral culpability. That said, frankly, you should have been the one, older, and taking account of your prior record, and what you knew that entailed, who should have intervened and persuaded the others to abandon a silly plan, regardless of at whose instigation, Killa da Crook or whoever.

[118] You should have stood up as a person with a record to tell the others this was foolish and senseless. I do not know what the pressures were that you experienced at that time, but you failed your partner and your son by being the getaway driver in a plan that you knew better than to permit yourself to be involved in. I am unable to accept any reasons for that failure, and none were offered. Had you had that moment of correct judgment, based upon your own prior criminal experience, I venture that despite the ravings of Killa da Crook, none of this would have happened.

[119] So, despite what I accept are your good prospects for rehabilitation, I have felt a need to impose a sentence higher than advocated for by your counsel. While less than the Crown asks for, for all of these reasons, I have determined the fit global sentence to be 7.5 years.

Count	Offence	Criminal Code Section
1	Conspiracy to Commit Robbery (465(1))	Stayed: *R. v. Kienapple*
3	Robbery with a firearm. (4 yr. MM) (344(1)(a.1))	6.5 years
6	Possession of a loaded prohibited or restricted firearm (95(2)(a))	4 yrs. concurrent to count 3
10	Occupy a motor vehicle with a Firearm (s. 94(2)(a))	2 yrs. concurrent to count 3
8	Fail to Comply with Weapons Prohibition (117.01(1))	1 year consecutive to count 3

[120] In the result, after pre-sentence custody credit of one year, I sentence you, Mr. James, to serve a remaining sentence of 6.5 years.

[121] Because you have both been convicted of an indictable offence involving the use of violence that is punishable by imprisonment for 10 years or more, it is mandatory that I impose an order against both of you under s. 109(1)(a) of the *Code*, relative to firearms possession, and in the circumstances of this case, I direct that the possession prohibition order be for life.

[122] Since armed robbery is an offence listed in paragraph (a) of the definition of "primary designated offence" in s. 487.04 of the *Criminal Code*, a DNA order is

mandatory. Pursuant to s. 487.051(1), I authorize the taking of the number of bodily samples reasonably required for the purpose of forensic DNA analysis and historical recording.

[123] Finally, were it not for the significant social context evidence of the very difficult life circumstances you have both experienced, and the very strong rehabilitation prospects that the EPSR authors describe in their reports, I would have been less inclined than I have been in setting these sentences for you.

[124] I am thinking for you Mr. Patten, of the tragic loss of your father and the exceptional hardships you and your mother had to bear in migrating to this country. Hopefully, the steps you have already taken in the process of rehabilitation will provide you with appropriate education and training that will enable you to achieve your goals. This sentence is the first step on that road. I am very hopeful for your future, but it is up to you.

[125] For you, Mr. James, I am thinking of your experience in being ripped away from your mother at six years of age. And neither of you had a strong male father figure in your lives, which the research shows likely contributed significantly to each of you taking the wrong path and ending out here in front of me today for sentencing.

[126] Yet, your family and support group see great promise for you, for the potential to be a good person who can make the changes to your life that will be needed to keep you on the better path and away from criminal trouble. Once your sentence is completed, I as well hope you will be able to rebuild your life and become a greater man.

Thank you. Those are my reasons for sentence.

Order accordingly.

Michael G. Quigley

Released: April 2, 2024

CITATION: R v. Patten and James, 2024 ONSC 1737
COURT FILE NO.: CR-23-50000040-0000
DATE: 20240328

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HIS MAJESTY THE KING

- and –

CHAVES PATTEN and RUSHSEAN JAMES

Defendants

REASONS FOR SENTENCE

Michael G. Quigley J.

Released: March 28, 2024