R. v. Farah

Ontario Judgments

Ontario Superior Court of Justice

N.J. Spies J.

Heard: June 10 and August 5, 2020 by videoconference.

Judgment: October 2, 2020.

Court File No.: CR-18-5-581

[2020] O.J. No. 4340 | 2020 ONSC 5956

Between Her Majesty the Queen, and Mohamed Muse Farah and Mohamed Ibrahim Ulusow, Defendants

(199 paras.)

Case Summary

Criminal Law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Protection against cruel and unusual punishment — Application by the accused for an order that the minimum sentence provisions of s. 85(4) of Criminal Code contravened s. 12 of Canadian Charter of Rights and Freedoms dismissed — Accused were charged with, among other things, use of imitation firearm in commission of offence — Accused faced consecutive one-year mandatory minimum sentences for each robbery, consecutive to sentences imposed for other offences — Court was bound by previous Court of Appeal decisions upholding the constitutionality of s. 85 of the Code — Canadian Charter of Rights and Freedoms, ss. 1, 12 — Criminal Code, ss. 85, 85(4).

Criminal Law — Sentencing — Criminal Code offences — Weapons offences — Using firearm in commission of offence — Carrying a concealed weapon — Offences against rights of property — Robbery and extortion — Robbery — Breaking and entering — Disguise with intent — Particular sanctions — Imprisonment — Concurrent sentences — Prohibition orders — Firearms — DNA sample — Sentencing considerations — Aggravating factors — Mitigating factors — Deterrence — Denunciation — Rehabilitation — Time already served — Totality principle — No previous record — Maximum or minimum sentence available — Effect on victim — Age of accused — Family background — - Character evidence — Deportation — Sentencing of accused Farah and Ulusow for conspiring to commit robbery, robbery, attempted robbery, robbery while having face mask, robbery using imitation weapon and carrying concealed weapon — Each accused sentenced to seven years plus one day less credit for time already served — Accused robbed complainants at ATM machines using threat and violence — Accused were masked and carried imitation firearm and sharp-edged weapons — Accused were young, first-time offenders — Each accused was sentenced to 11 years but the sentences were

reduced to seven years and one day because of totality principle — Criminal Code, ss. 85, 85(2), 85(2)(a), 85(3), 83(3)(a), 85(4), 88(2)(a), 95(2)(a), 109, 109(1), 344(1)(a.1), 344(1)(b), 351(2), 465(1)(c), 487.051(1), 718, 718.1, 718.2(a), 718.2(b), 718.2(c), 718.2(d), 718.2(e).

Sentencing of the accused Farah and Ulusow for conspiring to commit robbery, robbery, attempted robbery, robbery while having face mask, robbery using imitation weapon and carrying concealed weapon. In May and June of 2017 there were 13 robberies and attempted robberies at Automated Teller Machines (ATMs). In each case the complaints were forced to hand over their bank card and provide their PIN. Some of the complainants were also robbed of personal items such as cell phones and jewellery. In each case there was at least the threat of violence, including threats to use a firearm and/or a meat cleaver. The Major Crime Unit launched an investigation and officers set up surveillance on two banks. The police had been watching two males from across the street, and saw them cover their faces using bandannas and approach the complainant who was using the ATM. The police arrested two men. The men were identified as Farah and Ulusow. The Crown identified five items of clothing that the perpetrators were said to be wearing at different times during the robberies, and were seen on the videos of robberies. The accused were charged and convicted at trial. Farah was 23 years old. He was a permanent resident who came to Canada from Somalia with his mother when he was seven years old. At the time of the offences he was working as a general labourer. He was a first-time offender. A number of letters of support were filed on his behalf. Ulusow was 25 years old. He came from a large family. He was unemployed at the time of the robberies. He had no criminal record except for one breach of recognizance. A number of letters of support were filed on his behalf. While there were no victim impact statements filed, there was no doubt that it was a terrifying and traumatizing experience for each of the complainants as they were held at gunpoint while they were robbed of their personal possessions and money. The Crown sought a total sentence for each offender of eight year's imprisonment less credit for time already served. The defence sought a sentence in the range of three to five years, less credit for time already served. The accused brought an application for an order that the minimum sentence provisions of s. 85(4) of the Criminal Code contravened s. 12 of the Canadian Charter of Rights and Freedoms (Charter). If s. 85(4) was constitutional, the accused faced consecutive one-year mandatory minimum sentences for each robbery, consecutive to sentences imposed for the other offences. The defence asserted that such a sentence constituted cruel and unusual punishment.

HELD: Accused sentenced to seven years and one day's imprisonment less credit for time already served.

Application dismissed. The Court was bound by previous Court of Appeal decisions upholding the constitutionality of s. 85 of the Code. The defence Charter application was dismissed. The circumstances of the robberies were an aggravating factor. There were multiple offences and they were all planned and deliberate. The accused used masks to disguise their faces and sometimes gloves to avoid leaving fingerprints. They chose to arm themselves with imitation firearms and other sharp-edged weapons, brandish and threaten the complainants with those weapons and use violence in the form of threats and physical violence to obtain compliance. The accused were motivated by greed. Ulusow was the ringleader of the operation. The accused were both young and first-time offenders. Both had difficult childhoods. Subject to the principle of totality, a fit sentence for Farah was the minimum seven years for the use of an

imitation firearm, three years for the robbery convictions to run concurrently to one another but consecutive to the use of an imitation firearm sentence, one year for being masked, to run concurrent to the robbery convictions and one year concurrent to the robbery convictions for conspiracy. With respect to Ulusow, a fit sentence was the minimum six years for the use of an imitation firearm, four years for the robbery convictions to run concurrently to one another but consecutive to the use of an imitation firearm sentence, one year for being masked, to run concurrent to the robbery convictions and one year concurrent to the robbery convictions for conspiracy. That brought the total sentence for each accused to 11 years. After taking into account the principle of totality, the total sentence to be imposed on each accused was seven years, less pre-sentence custody for time served. Farah was given credit for two months and 12 days. Ulusow was given credit for 11 months and three days. Sentence: For Farah, seven years and one day imprisonment for use of imitation firearm, less credit for time already served of two months and 12 days; DNA order; 10-year weapons prohibition; For Ulasow, seven years and one days' imprisonment, for use of imitation firearm, less credit of 11 months and three days for time already served; DNA order; 10-year weapons prohibition.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 12

Criminal Code, *R.S.C. 1985, c. C-46, s. 84*, s. 85, s. 85(2), s. 85(2)(a), s. 85(3) s. 85(3)(a), s. 85(4), s. 88(2)(a), s. 95, s. 95(2)(a), s. 109, s. 109(1), s. 344(1)(a.1), s. 344(1)(b), s. 351(2), s. 465(1)(c), s. 487.051(1), s. 718, s. 718.1, s. 718.2(a), s. 718.2(b), s. 718.2(c), s. 718.2(d), s. 718.2(e)

Immigration and Refugee Protection Act, *S.C. 2001, c. 27, s. 36*(1)(a)

Counsel

Alice Bradstreet and *Michael Coristine* for the Crown.

Laurence Cohen, for the Defendant Mohamed Muse Farah.

Talman Rodocker, for the Defendant Mohamed Ibrahim Ulusow.

Reasons for Sentence and Decision

on Defence Application Re:

Constitutionality of s. 85(4) of

the *Criminal Code*

N.J. SPIES J.

Overview

1 On February 26, 2020, the Defendants were convicted of numerous counts in connection with a number of robberies of male customers using Automated Teller Machines ("ATMs") located in bank vestibules in the west end of Toronto. This included an attempted robbery on June 22, 2017 that no doubt would have been completed had the members of the 23 Division Major Crime Unit ("MCU") not been watching the Toronto Dominion Bank, where the Defendants attended in order to complete a robbery and arrested them. My Reasons for Judgement are reported at *R. v. Farah and Ulusow*, *2020 ONSC 1229* ("Judgment").

2 Mr. Farah was convicted of 23 charges as follows:

* one count of conspiring with Mr. Ulusow to commit robbery, contrary to s. 465(1)(c) of the *Criminal Code* (Count 1);
* six counts of robbery and one count of attempted robbery, contrary to s. 344(1)(b) of the *Criminal Code* (Counts 2, 7, 10, 13, 16, 19, and 22);
* seven counts of robbery while having his face masked, contrary to s. 351(2) of the *Criminal Code* (Counts 3, 8, 11, 14, 17, 20, and 23);
* seven counts of robbery while using an imitation firearm, contrary to s. 85(3)(a) of the *Criminal Code* (Counts 4, 9, 12, 15, 18, 21 and 24); and
* one count of carrying a concealed weapon, a meat cleaver, contrary to s. 88(2)(a) of the *Criminal Code* (Count 25).

3 Mr. Ulusow was convicted of 19 charges as follows:

* one count of conspiring with Mr. Farah to commit robbery, contrary to s. 465(1)(c) of the *Criminal Code* (Count 1);
* five counts of robbery and one count of attempted robbery, contrary to s. 344(1)(b) of the *Criminal Code* (Counts 2, 7, 10, 16, 19, and 22);
* six counts of robbery while having his face masked, contrary to s. 351(2) of the *Criminal Code* (Counts 3, 8, 11, 17, 20, and 23); and
* six counts of robbery while using an imitation firearm, contrary to s. 85(3)(a) of the *Criminal Code* (Counts 4, 9, 12, 18, 21 and 24).

4 Only Mr. Ulusow was charged with an attempted robbery on June 10, 2017, Counts 5 and 6, but those charges were withdrawn by the Crown during the course of the trial.

5 The Defendants are now before me for sentencing. As part of their sentencing hearing, the Defendants brought an application for an order that the minimum sentence provisions of s. 85(4) of the *Criminal Code* contravene s. 12 of the *Charter of Rights and Freedoms* and are not saved by s. 1. Ms. Bradstreet was counsel at trial and at the sentencing hearing, but she was not available for the *Charter* argument, which took place later. Mr. Coristine took carriage of the defence to that application on behalf of the Crown. These reasons will deal both with the Defence *Charter* application and the imposition of sentence.

The Issues

* Given the collateral immigration consequences Mr. Farah will face as a permanent resident, can his global sentence be allocated to a series of sentences that are six months, less a day each so he does not face near automatic deportation?
* What pre-sentence credits are the Defendants entitled to?
* How should the Defendants' *Charter* application be determined?
* What is a fit sentence for the Defendants in all of the circumstances?

The Facts

Circumstances of the Offences

6 The facts with respect to these convictions are set out in my Judgment. For the purpose of sentencing, a summary is as follows. All of the robberies occurred in the west end of Toronto, in the very early morning hours under the cover of darkness between 12:25 a.m. and 3:43 a.m. In each case the Complainant was male and was about to use, was using or had just finished using an ATM in an ATM vestibule of a major bank. There were as many as three perpetrators who entered the ATM vestibule and, in some cases, there was a fourth perpetrator who drove a getaway vehicle.

7 Much of the Crown's case against the Defendants was proven through video evidence taken inside the ATMs during the robberies. I identified Mr. Ulusow as Perpetrator #1, who in all of the robberies was wearing a unique bleach stained blue hoodie. I found that Mr. Farah was Perpetrator #2, who in all cases was wearing a combination of up to five specific items of clothing. In each case the Defendants were masked, and they were usually wearing gloves. I found that Mr. Ulusow and Mr. Farah either had an imitation firearm in their possession or that they must have been aware that the other had one or that Perpetrator #3 had one in his possession, and in each case the firearm was displayed. In some cases, one of the Perpetrators had an edged weapon which was displayed.

8 I found that Mr. Ulusow was the ringleader in that he directed the others to confine the Complainant. In each case the Complainants were forced to hand over their bank card and provide their PIN, and in most cases their wallet was taken and the cash removed. Mr. Ulusow then used the PIN to access the Complainant's bank account and in some cases, cash was removed from their bank account. Some of the Complainants were also robbed of personal items such as cell phones and jewellery. In each case there was at least the threat of violence, including threats to use the firearm and/or the edged weapon. A number of the Complainants were shoved and/or hit and punched, most often by Mr. Ulusow but also by Mr. Farah and/or Perpetrator #3. The Complainants were not able to fight back given the threat of the use of weapons and many were threatened that if they tried to intervene, they would be shot or stabbed. None suffered any injuries save for the robbery that only Mr. Farah was convicted of. In that case the Complainant was hit in the mouth by the stock of the imitation firearm by Perpetrator #3 and suffered a serious injury as a result.

Circumstances of Mr. Farah

9 I do not have Pre-Sentence Reports for Mr. Farah or Mr. Ulusow but I do have a great deal of information about them both, which I will review in some detail.

10 Mr. Farah testified at trial and he provided an affidavit in support of his *Charter* application. He is 23 and had just turned 20 years old at the time of these offences. He was born in Somalia and came to Canada when he was seven years old. He is a permanent resident and lives with his mother. His brother, Cimarin, who was a year younger, was murdered in December 2018. Mr. Farah went to a private Islamic school for grades 9 and 10 and then went to another private school for grade 11. He did not progress through high school beyond that. In June 2017, at the time of these offences, Mr. Farah was working irregular hours as a general labourer and at restaurants and he was living with his mother.

11 Mr. Farah is a first-time offender and a number of reference letters were filed on behalf of Mr. Farah:

(a) Muzaffar Baig, the principal of Can-ATM High School

12 Mr. Baig writes that he has known Mr. Farah for five years as a student, and states that he has shown "good discipline and diligence regarding his education," and always brings a positive attitude to school. Mr. Baig further states that as a student, Mr. Farah always challenged himself academically, participated in class, grasped material quickly and excelled in extracurricular activities.

(b) Ahmed Mohamed from the Delta Family Resource Centre ("Delta")

13 Mr. Mohamed writes that Mr. Farah has begun their Pempamsie, Ounce of Prevention (Oz) program, which is a wrap-around program for youth who are involved with the criminal justice system and their families. Delta offers services and programs to Black youth to help them make the right choices, reintegrate into society and lessen chances of recidivism. Mr. Mohamed states that he sees great potential in Mr. Farah. Mr. Cohen advised that Mohammed Shake, who is well known in the Ontario Court of Justice for his work with at-risk youth, works at Delta.

(c) A. Hassan from the Dar-ul-Hijra Islamic Centre

14 Mr. Hassan writes that through the years of knowing Mr. Farah they have witnessed him being involved in youth activities that take place in the Centre year-round. He describes Mr. Farah as polite, very smart and helpful and of good character. He also states that Mr. Farah listens intently to advice from elders and that he has taken the initiative to helping others his age, some of whom look up to him as a role model. This is something that has stood out at the Centre. He reports that Mr. Farah has sought guidance on his educational growth on his way to high school and beyond, and that they look forward to helping him upon his return to the community.

(d) Abdifitah Mohamud

15 Mr. Mohamud is a good friend who has known Mr. Farah for nearly 11 years. He describes Mr. Farah as always being a polite, quiet and shy person who has never done anything wrong to anyone for all the years he has known him. He met Mr. Farah in 2009 when he started grade 9 and got to know Mr. Farah, who is the same age as his younger brother, at school while participating in recreational activities. Mr. Mohamud described Mr. Farah as being more mature than his age group, and he states that he became closer to Mr. Farah after finding out other children would bully and taunt him due to the way he spoke and pronounced words. They were also together at another private school in 2013, where they grew much closer. They have stayed friends since school and according to Mr. Mohamud, Mr. Farah also aspires to become successful not only for himself but as a first-generation citizen from immigrant parents, especially since the death of Cimarin. Mr. Mohamud writes that he has completed a Bachelor's degree from York University and has tried to inspire Mr. Farah to go to university. He states that Mr. Farah had to take a leave from completing secondary education to support his family financially, working warehouse jobs at a young age. He concludes his letter by stating that Mr. Farah is the most remorseful person he knows and he asks for leniency for Mr. Farah so that he can get a second chance to make his parents proud and become a model citizen.

(e) Abukar Mohamed, Khalid Bin Al-Walid Mosque

16 Mr. Mohamed confirms Mr. Farah is a well known member of the Mosque community and is part of their congregation. He describes him as being "productive" to his family and members of the community at large. Mr. Mohamed states that they have known Mr. Farah as one of their volunteers and have found him to be a good person, honest, trustworthy, reliable, and hardworking. Mr. Mohamed also confirms that they offer counselling sessions for Mr. Farah at the Mosque, including counselling (family issues, marriage/divorce, youth counselling, stress, addiction), and youth drug/alcohol programs. Details of the one-to-one counselling they offer are set out in the letter, and Mr. Mohamed states that Mr. Farah could remain in their counselling sessions for as long as he wishes. He states that their programs will give Mr. Farah the chance to become useful and productive to his family and members of his community at large.

(f) Osman Ali, Executive Director, Somali-Canadian Association of Etobicoke

17 Mr. Ali has known Mr. Farah for a number of years. He writes that Mr. Farah has been an active volunteer with the Somali Canadian Association of Etobicoke for a number of years. This community based organization offers a wide range of services to the Somali community and other immigrants/refugees aimed at helping newcomers, youth and seniors adjust to life in Canada by offering frequent workshops and seminars that cover a plethora of different topics. Mr. Farah has greeted visitors and directed them to appropriate offices during multiple community events and participated in numerous workshops. Mr. Ali states that Mr. Farah had an excellent rapport with people of all ages that came into the office. He was known to be extremely kind, respectful and honest amongst his peers and to individuals that came for the workshops and seminars. Elders from the Somali Seniors program were pleased with how respectful and helpful he was and would often ask for him when he was away. Mr. Ali describes Mr. Farah as extremely hardworking in the office, that he completed the tasks that were assigned to him diligently and even stayed late to make sure that his work was completed. Mr. Ali states that although Mr. Farah has made an error in judgment in this case, he believes that he is still an

honorable individual and a valuable member of the Somali community and asks that I take these attributes of his character into consideration.

18 I did not receive a letter from Mr. Farah's mother, but I do recall that she came to court to show her support.

Circumstances of Mr. Ulusow

19 Mr. Ulusow also testified at trial. He is now 25 years old. He had just turned 22 at time of these offences and so he is about two years older than Mr. Farah. Mr. Ulusow comes from a big family. He has four brothers and four sisters. He met Mr. Farah at the Islamic school when they were both in high school. He finished his high school diploma and went onto Humber College and completed a two-year police foundation course. He decided that he did not want to become a police officer but rather wanted to take credits so he could transfer to York University to take criminology, which he did. He completed his first year of that program by the end of April 2017. At the time of the robberies he was unemployed.

20 Mr. Ulusow has no criminal record save for one breach of recognizance, which he pleaded guilty to. Mr. Ulusow was observed on LCBO video surveillance in clear contravention of his house arrest condition. He was involved in a police chase across the city and was ultimately arrested. He was given a sentence of one day of jail in addition to 15 days pre-sentence custody which enhanced was a total sentence of 23 days. This remains the only conviction on Mr. Ulusow's criminal record.

21 Mr. Ulusow has a great deal of family and community support and I received a number of letters on his behalf:

(g) Deeqa Hussein, mother

22 Mr. Hussein describes her family's background. She and her husband came to Canada as immigrants in the late 1980's to escape civil unrest in Somalia. Mohamed has three older sisters, four younger brothers and a younger sister. His younger brother, by two years, has autism and his younger sister has Down syndrome. Mr. Ulusow has an extremely close bond with them both. Ms. Hussein is a full-time mom and writes that her son is very helpful and supportive with his siblings. His father is a full-time taxi driver who works long hours just to make sure that ends meet. This meant at times he had to sacrifice being more present around his children.

23 When the family arrived in Toronto, they were moved into the Toronto Community Housing project of Jamestown. Ms. Hussein knew it was not a "productive place to raise [her] children", but she didn't have many other options. She always tried to occupy the children with activities and education from keeping them from hanging out outside. At a young age, Mohamed had already witnessed murders, shooting, prostitution and drugs. He was raised in an area where gang culture was celebrated and the youth in the area believed that they didn't have many options other than playing basketball or becoming a rapper. As Mohamed got older, Ms. Hussein started to notice the influence of older men who had gang affiliations on him. She was afraid that he would go astray and so she sent him overseas for a couple of years to escape

from this toxic environment. She wanted him to see and understand the opportunities that he had, from education and jobs to food, health care and human rights, that she did not.

24 Ms. Hussein encouraged her children to get a university degree. Mohamed watched as all of his sisters went university and he wanted to do the same. Although Mohamed was working to better himself, he remained in the same difficult environment.. His mother writes that he always felt stuck between two worlds. On one hand he was trying to stay away from the negative influences and gang activity in the community, while at the same time having friends living in the same environment.

25 Ms. Hussein writes that she was very shocked when she first found out Mohamed was charged with a robbery. She was disappointed in him and let him know his actions were very wrong. Ms. Hussein reports that her son told her how sorry he was for his actions, that he understood that his actions were never acceptable and that he put his victims through a lot of pain and stress. Ms. Hussein goes on to explain how she could relate to the victims, as she had just been violently robbed and attacked while using an ATM, and how she told her son how she felt when she got home. She writes that her son has assured her that he won't commit the same mistake ever again, that he doesn't want to be a product of the system and he feels like his charges do not define who he is as a person. As his mother, she believes that experience is the best teacher and that her son has learned from this. Ms. Hussein states that she will always continue to support her son whom she loves very much.

(h) Najma Ulusow, sister

26 Najma is 26 years old and currently attending medical school at the University of Sydney. She confirms some of the information set out in her mother's letter, which I will not repeat. She reports that the crimes her brother has committed have changed his life forever. She too believes his actions were very out of character and that he isn't a danger to society. She reports that he understands what he did was wrong and constantly expresses what he did was the biggest mistake of his life. He has also acknowledged factors such as surrounding himself with bad influences, the climate of the neighbourhood he lives in, financial pressure and drug use as contributing factors as to why he committed the robbery. Najma also explains how her brother, as the eldest son, felt he had no one to lean on when he was growing up because he wanted to reduce the burden on his Mother, who was stressed out raising his autistic brother and then his sister with Down syndrome, and his father, who worked long hours as a taxi driver. Money was a problem growing up and they lived in subsidized housing their whole lives in communities associated with gun violence, gang activities and drug abuse. She writes that many of her brothers' friends have died from gun violence or are in jail.

(i) Nasra Ulusow, sister

27 Nasra has recently graduated from York University with both a Diploma and Bachelor's degree in Early Childhood Education. She too confirms much written by her mother and sister Namja. She writes about the obstacles they had to overcome living in a marginalized community and the disadvantages and barriers they faced compared to peers around them. Nasra states that her brother has told her that he was introduced to alcohol and cannabis, which caused additional family issues to arise. Over time he began associating with friends that did not share

the same goals as him. Namja states that her brother has also expressed remorse to her and that he is now determined to better himself. He has told her that he wants to enroll in an apprenticeship program at Humber College and that he wants to develop a youth program that will build educational skills for youth that living in marginalized communities.

(j) Mahad Yusuf, Executive, Director Midaynta Community Services ("Midaynta")

28 Midaynta is a social and settlement services agency, working to improve the quality of life of newcomers and youth in Toronto. Mr. Yusuf has known Mr. Ulusow and his family for many years. He states that he expected more from Mr. Ulusow, as he was doing well for himself coming from a troubled neighbourhood. Mr. Yusuf states that Mr. Ulusow has always been kind, helpful, generous, respectful and trustworthy. He recalls pushing Mr. Ulusow to stay in school and obtain a degree. Mr. Yusuf writes that Mr. Ulusow has expressed his remorse and shame for the robberies he has committed and that he understands that his actions were dangerous and wrong. He also states that Mr. Ulusow understands the seriousness of having a criminal record and the impact it will have on his life and that he is committed to learning from his mistake. Mr. Ulusow has assured Mr. Yusuf that he would never make the same mistakes again or even associate with individuals in conflict with the law.

29 Mr. Ulusow has committed to enroll in Midaynta's Project Turn Around's Prevention program, which provides culturally relevant services to at-risk youth. He has expressed a desire to seek support and guidance towards achieving his goals and has committed to attending counselling sessions at Midaynta. Mr. Yusuf believes that Mr. Ulusow can achieve his goals with their continued support.

(k) Abukar Mohamed, director of Khalid Bin Al-Walid Mosque

30 I have already referred to the letter Mr. Mohamed wrote on behalf of Mr. Farah. He also provided a character reference for Mr. Ulusow whom he states that he has known Mr. Ulusow for many years as a well known member of their community. He states Mr. Ulusow is an active participant in their organization as he would often come to the mosque and participate in events and other activities. Mr. Mohamed describes Mr. Ulusow as a kind, hardworking, well-mannered and respectful person. He states that Mr. Ulusow knows that his actions were "inexcusable wrong and irresponsible" and that he has felt shame for his actions and is asking for forgiveness. Mr. Mohamed states that he really believes Mr. Ulusow understands that his actions were wrong, and he believes that with the right guidance and support Mr. Ulusow can rebound from the mistakes he committed and can flourish into successful young man.

(l) Mohamed Warsame, friend

31 Mr. Warsame is a close friend who has known Mr. Ulusow for about seven years. They met while working as security guards for outside events and they both went to Humber College. He recalls finding out about Mr. Ulusow being charged with the robberies by watching cp24, and he was completely in shock. He and Mr. Ulusow had become friends because they are both Black men who share the same ethnicity and were raised in similar Toronto Community Housing projects. They also both wanted to go to post-secondary school and get good paying jobs. Mr. Warsame described Mr. Ulusow as hardworking, honest, loyal, trustworthy, responsible and

loving. Like the other letters, he describes how Mr. Ulusow has told him how much he regrets his behavior, how much shame he feels and how much embarrassment his actions have brought upon him and his family. He also understands that he hurt innocent victims and he feels remorseful for his actions. Mr. Warsame believes that Mr. Ulusow can turn over a new leaf and become a productive member of society.

(m) Nimco Mohamud, friend

32 Mr. Mohamud has a Bachelor of Arts degree and a certificate in Digital Communication -- Journalism from York University. He met Mr. Ulusow in 2016 in their first year of university and they developed a great relationship both inside and outside of the classroom. They have the same ethnic background and shared a drive to succeed. Mr. Mohamud describes Mr. Ulusow as charismatic, driven, caring, and social. He states they became study buddies and that Mr. Ulusow was always willing to give extra support to him and other struggling first-year students. Mr. Ulusow told him what happened when he reached out to Mr. Ulusow after noticing that he was starting to miss some classes. Mr. Mohamud states that Mr. Ulusow has always talked about setting a great example for his siblings. Mr. Ulusow told him how deeply regretful he is, and that he felt like he not only disappointed himself but also his parents and siblings and he now understands his mistake.

(n) Information from Mr. Ulusow

33 I learned about Mr. Ulusow from his evidence at trial, a letter he provided to me during his sentencing and his statement to me at the end of the sentencing hearing. Mr. Ulusow testified that the attempted robbery of Mr. Hamilton was not a crime done "on reason". He attributed it to the fact that he was high and a little intoxicated. Mr. Ulusow testified that this ruined five years of hard work where he was trying to be a statistic of a black male who did make it to post-secondary education. He testified, however, that he was taking responsibility for the attempted robbery of Mr. Hamilton and by his evidence at trial, in effect he pleaded guilty to counts 22-24 inclusive.

34 In his letter, Mr. Ulusow states that he takes full and complete responsibility for the crimes that he committed, and he is sorry for his cowardly actions. As Mr. Rodocker stated, his letter effectively waived any appeal he might have had. In his letter, Mr. Ulusow states to his victims that he is deeply remorseful for what he put them through and that he understands that his actions were reckless and dangerous and that he had no legitimate reason for the crimes he committed. He states that his actions were cowardly, and he is deeply ashamed. He assures this Court that his actions are not ones he intends on ever committing again and that he "want[s] to be a law-abiding productive member of society. I hope you can forgive me for my mistakes and that I am sincerely sorry for my actions."

35 Mr. Ulusow in his letter goes on to describe his upbringing, much of which I have already learned from his mother and two sisters. He describes growing up in Jamestown in Rexdale as being "tough and challenging" and that at the age of five, he saw a man being shot to death as he sat in his backyard playing with his brother. At the age of ten, he woke up to one of Toronto Police's biggest raids, dubbed Project "XXX", where there were over 100 arrests and large

quantities of drugs and guns were seized. Mr. Ulusow states, "I can say the area breeds a certain mentality."

36 Mr. Ulusow also describes how his mother moved him to Kenya and Somalia for a couple of years at the age of 12 when she began to fear he was getting caught up with the gang. While living there he understood why his parents moved to Canada and realized how lucky he was to be a Canadian citizen. Understanding that he had a lot of opportunities in Canada, he was determined not to get caught up with gangs and drugs when he got back and that he would rise above all the obstacles and make something out of himself.

37 Mr. Ulusow describes how he did that when he came back by finishing high school and his goal was to get accepted into university. Instead he completed an accelerated diploma program at Humber and then went to York University for criminology. Mr. Ulusow states that although he was progressing, his surroundings were the same and he started experimenting with drugs - mainly weed and alcohol. Since weed was illegal at that time, he started mingling with gang members to obtain it. The more time he spent with gang members, the more he saw the money they were making illegally, and eventually this caught his attention. At the time of his arrest he had just finished his first year of university. He was unemployed at the time and "desperately in need of money". Mr. Ulusow admits he was "blinded by the money" and he never thought about the consequences of his actions. He states that he never intended to physically harm the victims and made himself believe that it would be okay because the bank would refund them their money. He states: "I understand now that crime doesn't pay and that I should have gotten a job."

38 Mr. Ulusow states that he is very sorry for his actions and that the other day his mother was violently robbed at an ATM vestibule while she was removing cash. She was physically assaulted, and her face was bruised. She cried as she explained to him how she was assaulted and her fear that she was going to die or something bad was going to happen. Mr. Ulusow states that as he:

> saw the trauma in my mom eyes as she explained to me what happened I thought about the innocent victims I robbed. I thought about how scared they must have felt. At the moment, I felt like a coward. I can say that I fully understand the consequences of my actions. I would like to apologize for misleading the court. I was a coward to do these robberies and even at trial I lacked the courage to fully admit the truth. I am sorry for my actions and I am seeking forgiveness before you. I would like to learn from my mistakes and move on with my life. If given the chance I would like to go back to and complete a computer engineering program at Humber. I would like to also echo again that I am very sorry for everything I have done, and I am 100 percent confident that I will never be involved in anything criminal.

39 Mr. Ulusow also addressed me. I was able to tell when Mr. Ulusow testified and spoke to me that he is articulate and clearly intelligent. Again, he told me how very sorry he is and how deeply regrets his actions, which he described as wrong, dangerous, irresponsible and cowardly. He assured me that it was not something he would do again. He apologized to the court for not having the courage to take responsibility before.

Impact on the complainants

40 The Crown has not received victim impact statements from any of Complainants. I am able to consider, however, the impact this has had on them from the evidence before me at the trial and what Mr. Ulusow has told me about how his own mother reacted to a similar type of robbery.

41 The evidence I have from the trial is that Mr. Robinson was robbed at both gun and knife point. The gun was racked, which, to Mr. Robinson, meant that it was real. He was threatened with the gun and told he could be shot. His pockets were searched for personal items and his bank account depleted.

42 Mr. Iwankewycz was also robbed at knife point and testified that he was told that if he did not comply, he would be both shot and stabbed. When his PIN didn't work, Mr. Ulusow sucker punched him in the face. He was robbed not only of money, but of two jewelry items that were of significant sentimental value.

43 Mr. Panchancharam had a gun pointed at his head. He was forced to his knees. When his PIN didn't work, Mr. Ulusow punched him in the face. He was held on the ground as Mr. Farah and Mr. Ulusow attempted to empty his bank accounts. He was robbed of his watch.

44 Mr. Yang was robbed at gun point. Cash was taken from his wallet. The unidentified Perpetrator #3 hit Mr. Yang in the mouth with the butt of his gun when Mr. Yang would not give over his car keys. Mr. Yang suffered a severe dental injury that required an expensive and painful procedure to remedy.

45 Mr. Cutajar was robbed at knife point. A gun was present, but Mr. Cutajar was certain it was not real. He was worried about being stabbed, however, and so he complied with the demands. Mr. Cutajar was shoved, his bank account was emptied, and his cell phone stolen. His phone was recovered during the search conducted of what I found to be the getaway vehicle.

46 Mr. Attard was robbed at both knife point and gun point. He was shoved and robbed of his personal items in addition to funds from his bank account.

47 Finally, Mr. Hamilton was in the process of using the ATM when he was approached by Messrs. Farah and Ulusow. Thankfully, they were stopped and arrested before a robbery of Mr. Hamilton could take place. On that occasion, Mr. Ulusow was armed with an imitation firearm, and Mr. Farah, a meat cleaver.

48 Even in the absence of victim impact statements, there can be no doubt that this was a terrifying and traumatizing experience for each of the Complainants as they were held at gunpoint while they were robbed of their personal possessions and money. Using an ATM is something that most citizens do on a daily or weekly basis. This type of crime could happen to anyone, but the Complainants were particularly vulnerable given that the robberies occurred in the early morning hours when no one else was around. Some of the Complainants had no choice but to use the ATM then, as they were shift workers. Although all but Mr. Yang did not suffer any serious physical injuries, I am sure the emotional trauma would be lasting. The

Complainants will likely never approach an ATM in the same way, and certainly not late at night if possible. The information I have from Mr. Ulusow's mother puts into words what I am sure these Complainants felt when they were robbed.

Legal Parameters

49 The maximum sentence for a robbery conviction is life pursuant to s. 344(1)(b) of the *Criminal Code*. The same is true for the conviction for conspiring to commit robbery contrary to s. 465(1)(c) of the *Criminal Code*. The maximum sentence for committing robbery while masked contrary to s. 351(2) of the *Criminal Code* is 10 years. With respect to robbery while using an imitation firearm, contrary to s. 85(2)(a) of the *Criminal Code*, there is a mandatory minimum punishment of one year and a maximum of 14 years, pursuant to s. 85(3)(a). As a result of s. 85(4), that minimum sentence must be imposed for each conviction. Since they all arise out of the same series of events, they must all be served consecutively to the other sentences imposed. This is what counsel referred to as the "stacking effect" that has resulted in the Defendants bringing their *Charter* application. Counsel were agreed that because of s. 85(4), the minimum global sentence for Mr. Farah is seven years and for Mr. Ulusow, six years. Finally, Mr. Farah's conviction for carrying a concealed weapon, a meat cleaver, contrary to s. 88(2)(a) of the *Criminal Code* carries a maximum sentence of 10 years.

Positions of Counsel

50 Although Mr. Farah was found guilty of one further robbery than Mr. Ulusow, Mr. Ulusow was the ringleader of this string of robberies, he obtained a conviction while on bail for these offences, and he was often the one who meted out violence on the complainants. For these reasons, the Crown asks that both Defendants be sentenced to the same sentence. Defence counsel did not dispute this, although for reasons I will come to, it may be that Mr. Farah will have to serve an additional year.

51 Ms. Bradstreet submitted that the offences committed by Messrs. Farah and Ulusow call out for an exemplary sentence and that the range of sentence of a spree of similarly situated robberies is three to 10 years. It was her position that in relation to the robbery counts, both offenders should be sentenced to four years for each robbery, concurrent to each other. With respect to the counts of having their faces masked, she sought a sentence of 18 months consecutive to the robbery counts but concurrent to each other. With respect to the counts of using of an imitation firearm, Ms. Bradstreet sought a sentence of 18 months consecutive to the robbery counts, concurrent to each other and with respect to the conspiracy to commit robbery conviction it was her position that the sentence should be one year, consecutive to the robbery counts. Considering the principle of totality, Ms. Bradstreet submitted that an appropriate sentence is eight years in the penitentiary for both Mr. Farah and Mr. Ulusow, minus pre-trial custody. In addition, she requested a DNA order and a s. 109 order for 10 years.

52 As Mr. Coristine submitted, presuming that I find s. 85(4) of the *Criminal Code* constitutional, I must allocate the proposed sentence of eight years different than initially proposed. I would start with the fact that in light of s. 85(4), a minimum sentence of seven years should be imposed on Mr. Farah and a minimum six-year sentence should be imposed on Mr. Ulusow for

the use of an imitation firearm. This would be four years for the robbery convictions to run concurrently to one another, 18 months for having their faces masked, concurrent to the robbery convictions, and one year for the conspiracy count. This would bring the total sentence for Mr. Farah to 11 years and Mr. Ulusow to 10 years, which considering the principle of totality would be reduced for each of them to eight years.

53 Defence counsel had no issue with the ancillary orders requested by the Crown but submitted that the sentence imposed should be much lower. Both counsel took the position that a fit global sentence for a first time youthful offender would be in the range of three to five years. Mr. Cohen, however, argued that the sentences for each of Mr. Farah's convictions should be six months less one day, with the sentences to run consecutively to one another, to add up to a fit global sentence, so that Mr. Farah does not face automatic deportation as he is a permanent resident. Mr. Rodocker, on behalf of Mr. Ulusow, submitted that the range for the robbery convictions should be two and one-half to three and one-half years and an additional year for the convictions for using an imitation firearm. He conceded that given the number of robberies a court could easily sentence at the high end of range.

54 Both Defence counsel submitted that I would only be able to impose a sentence in the range of three to five years if I grant their *Charter* application and find that the minimum sentence provisions of s. 85(4) of the *Criminal Code* contravene s. 12 of the *Charter of Rights and Freedoms* and are not saved by s. 1. Otherwise, because of the "stacking effect" provided by s. 85(4), I would have no alternative but to impose a minimum sentence on Mr. Farah of seven years, and Mr. Ulusow of six years.

Principles of Sentencing

55 The fundamental purpose of sentencing, as set out in s. 718 of the *Criminal Code*, is to ensure respect for the law and the maintenance of a just, peaceful and safe society. The imposition of just sanctions requires me to consider the sentencing objectives referred to in that section and aim to achieve same with the sentence I impose. The objectives are denunciation, specific and general deterrence, separation of offenders from society when necessary, rehabilitation, reparation for harm done and the promotion of a sense of responsibility in offenders and acknowledgment of the harm which criminal activity brings to our community. In addition, in imposing a sentence I must take into account the principle of proportionality and the applicable aggravating and mitigating circumstances relating to the offences as set out in s. 718.2.

56 In this case I must also consider the fact that the Defendants are youthful offenders. The Court of Appeal for Ontario in *R. v. Priest*, *[1996] O.J. No. 3369* considered a case of a young first offender and stated 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]. Similarly, in *R. v. Borde*, *[2003] 63 O.R. (3d) 417* (Ont. C.A.) the court at para. 36 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. [Emphasis added]

Sentencing Case Law

57 There are few reported cases that align with the facts in the case at bar, and in particular a series of robberies in ATM vestibules. I agree with Ms. Bradstreet that complainants of ATM robberies share a common vulnerability with clerks of convenience stores and gas stations who are robbed late at night. They are often alone, with access to cash, and the inability to defend themselves from anyone who preys upon them. Given this commonality, I am of the view that sentencing for those types of offences will also be helpful to my determination of a fit sentence in this case.

58 Counsel provided a number of sentencing decisions in support of their respective positions. I will refer to those decisions I found particularly helpful, beginning with the decisions from the Ontario Court of Appeal.

R. v. Superales, *2019 ONCA 792*, *[2019] O.J. No. 5008*

59 The most recent decision from the Court of Appeal dealt with a youthful first-time offender who was convicted of a single robbery of a convenience store using an imitation firearm. The court substituted an 18-month jail sentence for the five-month jail sentence imposed by the trial judge. In doing so the court stated:

> [1] We are of the view that the trial judge imposed a sentence that is demonstrably unfit by failing to recognize that denunciation and general deterrence are the paramount sentencing objectives for the offence and by concluding the minimum sentence required under s. 85(3)(a) was grossly disproportionate punishment for the offence. His declaration that s. 85(3)(a) is invalid is set aside.

60 The court found that the circumstances of the case were similar to those in *R v. Clarke*, *2014 ONCA 296*, where the court upheld a global sentence of two years less a day. *Clarke*, however, was distinguished on the basis that Mr. Superales did not use the imitation firearm beyond initially brandishing it. There were also numerous mitigating factors present, in that he was a youthful first offender, he did not use the imitation firearm beyond initially brandishing it, no violence was used, he made a full confession to police, he pleaded guilty, there were documented mental health issues and he had family support and rehabilitative prospects.

61 With respect to determining a fit sentence, the fact the court referred to its earlier decision in *Clarke*, which I will come to, is important. *Superales* is distinguishable of course as apart from the attempted robbery of Mr. Hamilton to which Mr. Ulusow pleaded guilty; the Defendants did not confess to police or plead guilty, there is no evidence of either having any mental health issues and they committed multiple robberies and used violence. I will come back to this decision when I consider the Defence *Charter* application.

R. v. Nassri, *2015 ONCA 316*, *[2015] O.J. No. 2311*

62 In *Nassri*, a decision relied upon in particular by Mr. Cohen, the offender was sentenced to nine months' imprisonment following his convictions for robbery and possession of a weapon for a dangerous purpose. On appeal, although the offender had already served his sentence, and did not argue that his sentence was not fit, the court reduced his sentence to a custodial term of just under six months. This was because it was not known at the time of his sentencing that as a result of what was then a recent change in the law, the offender as a permanent resident would face more or less automatic deportation to Syria if sentenced to a term of six months or more imprisonment.

63 The robbery involved four men who entered a CIBC branch in the morning, armed with knives and their faces covered with bandanas. One of the men obtained money at knife-point. The offender had driven the three men to the area and parked across the road from the bank. He waited in the car. Following the robbery, the three men ran to the car and got in. The appellant drove away at a high rate of speed but almost immediately ran a stop sign and collided with an 18-wheel tractor-trailer. The appellant stayed with the damaged car and offered to pay the driver to be "let go". The other three men fled. The trial judge convicted Mr. Nassri as a party because he disbelieved his denial that he did not know the other men were planning to commit a robbery. Two of the other participants in the robbery had been convicted and sentenced. One, who was 18 years old at the time of the offence, had no criminal record and had pleaded guilty during the preliminary inquiry was sentenced to 13.5 months incarceration.

64 Like the Defendants, Mr. Nassri was young: 21 years old at the time of the offence and 24 years old at the time of sentencing. He was living with his parents in Canada, having immigrated in 2005 from Syria and had strong family support. He had no criminal record save for one minor incident of failing to comply with his recognizance. At the time of the offence he was taking college business courses and was described as an "exemplary student" and was operating a small business. In reducing the sentence, the court, at para. 32, rejected the Crown's submission that a sentence of less than six months would offend the parity principle because the lengthier sentences imposed on two of the other offenders could be "readily explained on the basis that they were the ones who used weapons and threatened victims to carry out the robbery". The court's decision in *Clarke* was not referred to.

65 In my view this decision is clearly distinguishable from the case at bar. First of all, although Mr. Nassri was convicted as a party, as the court noted, he was the getaway driver and was not the one who used a weapon or threatened the Complainants, unlike the conduct of the Defendants in the robberies they have been convicted of. Furthermore, there were no imitation firearms used, the men were not masked and there was no conspiracy to commit robberies, as I have found in the case at bar.

66 Mr. Cohen relies upon this decision to argue that six months less a day would be a fit sentence on the individual robberies Mr. Farah has been convicted of, all to run consecutively, in support of his proposed solution to allow Mr. Farah to avoid the near automatic consequences of deportation. That is an issue I will come to.

R. v. Clarke, *2014 ONCA 296*, *[2014] O.J. No. 1853* (C.A.)

67 In *Clarke*, the offender was sentenced to a global sentence of two years less a day upon a joint submission following a guilty plea to charges of robbery, use of an imitation firearm, and disguise with intent. The sentence was comprised of the minimum one-year sentence for the use of the imitation firearm and a consecutive term of one year less a day on the offences of robbery and disguise with intent. The offender had entered a convenience store shortly after midnight, wearing a mask over his face, pulled out an imitation handgun, and pointed it at the head of the complainant. He then pushed the weapon against the complainant's ribs and demanded cash and cigarettes, threatening to shoot the complainant if he did not comply. The offender was arrested shortly thereafter near the scene of the robbery.

68 In considering the joint submission, the trial judge considered that the offender was a youthful first offender - 19 years old - and had entered a guilty plea and acknowledged the seriousness of his conduct. He was described by the sentencing judge as having "an incredible amount of potential" and that his chances for rehabilitation were "very good". He had the full support of his family and filed supportive letters from friends and from people with whom he had worked. In addition to compliance with the terms of a fairly strict release, the was a psychiatric report that stated that the offender had stopped taking anti-depressant medication and that while it could not be said that the robbery was a direct result of the lack of medication, it could have been a factor.

69 On appeal, the offender conceded that the sentence was fit when imposed but argued that the sentence should be reduced on account of fresh evidence relating to the steps he had taken towards rehabilitation following conviction and sentence.

70 On appeal the court stated at para. 17 that because of the offender's potential and predicted success on those fronts he had secured the benefit of a "relatively lenient sentence based upon a joint submission". The court acknowledged, at para. 18, that:

> sentencing a youthful first offender who demonstrates potential for rehabilitation is a difficult and at times agonizing task. In this case, the offences were serious but the appellant's potential for rehabilitation is high. The sentencing judge followed a joint submission and imposed the sentence that was plainly at the low-end of the range. It is well-established in the case law that robbery of a convenience store at night while wearing a disguise required custodial time in addition to the one year minimum for the firearms offence. ...
>
> ...
>
> [20] In the end, we find ourselves essentially in the same position as the sentencing judge. We understand the trial judge's unhappiness about having to impose the sentence of two years less a day on this young offender. However, given the gravity of the offence, the governing law, and the fact that the sentence was at the low end of the range and imposed following a joint submission, we consider that in law we must uphold the sentence. [Emphasis added]

71 The *Clarke* decision is the closest that the Court of Appeal has come to providing guidance on a range of sentence for a robbery committed while being masked and using an imitation firearm. It is significant that the court found the global sentence of two years less a day upon a joint submission following a guilty plea to charges of robbery, use of an imitation firearm, and disguise with intent plainly at the low end of the range. In the case at bar, there was no guilty plea and no evidence of mental health issues, and of course I must sentence the Defendants to multiple charges of robbery, use of an imitation firearm, and being masked, and the conviction for conspiracy to commit these robberies.

R. v. Drisdelle, *[2002] O.J. No. 3901*, 2002 CanLII 41547 (Ont. C.A.)

72 Mr. Rodocker submitted that the *Drisdelle* decision is "remarkably on point". The offender and two accomplices robbed a pizza store in the early morning hours. The offender drove the getaway car. His two accomplices wore masks and carried metal pipes. They stole cash from the cash register and the wallet of the clerk who was on duty in the store. The clerk was not physically harmed. A second robbery occurred at approximately 10:30 p.m. four days later, at a gas bar where two clerks were working. The offender's accomplices entered the gas bar, wearing masks. A scuffle ensued and one of the gas bar attendants was cut across his right temple and ear with a knife carried by one of the accomplices. The cut required six stitches to close. Both attendants were threatened and verbally abused. Again, cash was stolen from the cash register, together with cigarettes and cigars, $10 from one of the attendants and the cell phone and money pouch of the other attendant. The offender again drove the getaway car. He also communicated by cell phone with his two accomplices, providing advice on the best time to rob the gas bar.

73 The offender was 19 years old at the time of the robberies and had no prior criminal record. Following an extended period of pre-trials, he pleaded guilty to both robbery charges. At trial, the parties agreed that a reformatory sentence was appropriate, but disagreed as to whether a conditional sentence should be imposed. The offender's two accomplices received sentences of two years less one day after credit for pre-trial custody (the adult offender), and twelve months secure custody and two years' probation (a youth offender), respectively, on two counts of robbery arising from the same incidents.

74 On appeal the court stated as follows:

> [9] The trial judge recognized that robbery is a most serious crime. That is particularly so when, as here, the use of weapons is involved, one or more of the Complainants is injured, the commission of the offence occurs late at night and the Complainants occupy vulnerable and isolated positions.
>
> [10] The trial judge rejected the defence submission that the appellant's role in the robberies was minimal. The appellant drove the getaway car, drove his accomplices to the robbery locations, knew the intention to commit the robberies, assisted his accomplices in implementing the second robbery by communicating with them by cell phone, and facilitated their escape. The trial judge observed that the circumstances in

> this case indicate "a very serious public need for denunciation, general deterrence, and ultimately a period of incarceration". I agree.
>
> [13] It is important however, in my view, to emphasize several other features of this case. First, the appellant's conduct in the robberies is to be contrasted with that of his accomplices. While the appellant's role was serious, and not insignificant, it did not involve the use of violence or weapons, an attempt at disguise, threats to the Complainants of the robberies or verbal abuse of them. In contrast to the appellant's sentence, one of his accomplices, a young person whose role in the robberies was materially different than that of the appellant, received concurrent sentences of twelve months secure custody and two years probation on similar robbery counts arising from the same situation. The different sentence for the appellant was not based on any clear distinction by the trial judge between the role of the appellant and the role of the relevant accomplice. Such a comparison would have favoured the appellant. Disparity in sentence is a principle which deserved considerable attention in this case.
>
> [14] Moreover, the trial judge found that there was evidence of a maturing in the appellant's thought processes and a recognition by him of the shame and disgrace that he visited upon himself and his family. He undertook voluntary counselling prior to his arrest on the offences at issue and, unlike his accomplices, had no prior criminal record. In addition, he was not involved in any further criminal activity after the robberies and prior to his arrest on the offences for which he was sentenced by the trial judge.
>
> [15] In my view, with respect, the reasons of the trial judge do not reflect sufficient consideration of the cumulative importance and implications of all of the factors described above. Accordingly, I conclude that the proper jail sentence in this case for the appellant is twelve months, rather than eighteen months as imposed by the trial judge. [Emphasis added]

75 In a strong dissent, O'Connor A.C.J.O. stated that he did not consider that the sentence of 18 months imposed on the appellant offended the principle of treating similar offenders and offences in a similar manner. At para. 21, he stated that in considering whether there is an unacceptable disparity between the sentence imposed on the appellant and the sentences imposed on the accomplices, a comparison to the sentence imposed on the adult accomplice was the more appropriate gauge. He continued at para. 22, stating that "depending on whether one allows 2:1 for the pre-trial custody of the adult accomplice, his sentence was the equivalent of either two and a half or three years imprisonment." On that basis O'Connor A.C.J.O. concluded that the sentence of 18-months imprisonment imposed by the trial judge on the offender, given his lesser role, fell within the appropriate range for this offence and this offender.

76 I do find this case difficult to reconcile this decision with *Clarke*, but of course it was decided before that decision. The sentence imposed on the offender reflected what the majority felt was his diminished role in that he drove the getaway vehicle, which is not the case for either of the Defendants. That said, the sentence imposed on the adult offender, who played an active role akin to the Defendants in the case at bar, was as much as three years imprisonment according to the calculation by O'Connor A.C.J.O., which is in line with *Clarke*.

R. v. Boyle [1985] O.J. No. 33 (C.A.)

77 *Boyle* is a dated decision from the Court of Appeal. In that case the offender was convicted after pleading guilty to two robberies of convenience stores, late in the evening. In one case he was partially masked, armed with a knife and approached the young woman cashier and demanded the money. He gestured toward her with the knife, she opened the till, gave him the money and he fled. When he was arrested on the second charge of robbery a month later, he confessed to the commission of this offence. A month later, the offender was masked and armed with a knife and entered a restaurant and tavern. He approached the owner and demanded money. She tried to "stall him". He said something to her which she interpreted as a threat. She then opened the cash register. He seized the money, waved the knife in the direction of some customers who were in the restaurant and fled. Three male customers gave chase and caught the offender. The offender did not hurt either of the Complainants with the knife and the trial judge found that he had no intention of doing so. The offender was 23 years of age, had been previously convicted on eight counts of robbery, a count of unlawful confinement and a count of kidnapping, in respect of which a total sentence of three years in the penitentiary was imposed. He was on mandatory supervision when these offences were committed. The sentencing judge sentenced him to 14 years.

78 On appeal the court noted, at para. 6:

> The learned trial judge quite rightly, in our view, held that the operators of convenience stores are vulnerable to the offence of robbery and they must be protected by the imposition of appropriate sentences. He concluded that the primary factor to be considered in imposing sentence in this case was deterrence, both specific and general, and concluded that the appellant's potential for rehabilitation was slight indeed.

79 The court went on at para. 7 to note the offender's unfortunate childhood and that he had no marketable skills, but that given his age the possibility of his rehabilitation should not be entirely foreclosed. The court noted that the offender now recognized that he had a problem with the abuse of alcohol and drugs and had sought help, and that he was making very serious efforts to rehabilitate himself and to fit himself for employment when he is released from prison.

80 The court concluded at para. 8 that although the offences were extremely serious, and the offender had a serious criminal record, a sentence of 14 years was excessive and substituted a sentence of four years on each count consecutive, the sentences to be consecutive to each other and to the unexpired portion of any sentence that the appellant was then serving.

81 This case is distinguishable given the offender's prior serious criminal record but it is a case where, unlike many referred to me, two robberies were committed.

82 Turning to decisions of this court, the following are of some assistance.

R. v. McLaughlin, 2014 ONSC 307, [2014] O.J. No. 316

83 *McLaughlin* is a decision of mine that Mr. Rodocker referred to. I agree with him that the

circumstances of the robbery are similar in that the offender and three other young men tried to rob a couple in a parked car. The men were banging and kicking the car doors trying to get in and one of the offenders at the driver's door pointed a firearm into the car and demanded that the driver and his passenger get out of the car and that they "give me what you've got". It was not the position of the Crown at trial that it was Mr. McLaughlin who pointed a firearm at the driver. An imitation firearm was also brandished by one of the men. The driver was not intimidated by this and in fact wanted to exit the car with a knife as a weapon, but his passenger was naturally very frightened. She began to scream and convinced him to drive away. After the driver dropped her off nearby, he returned, looking for the men who had robbed him. He spotted one of the men and made a citizen's arrest. Mr. McLaughlin was later arrested as his palm print was identified on the driver door window.

84 Mr. McLaughlin was 19 at the time of the offence and had a substantial related criminal record. Counsel agreed that the decision of Justice Hill in *R. v. K.G.*, *[2012] O.J. No. 2785*, a decision of Hill J., was closest to the facts of this case. Hill J. noted that the offender participated with two others in the planning of what was effectively a carjacking and that he was a party to an armed robbery in which he consented to the use of an imitation firearm by his accomplice resulting in terrorizing the victim, who had no way of knowing that the very real-looking firearm was a replica. Hill J. also considered that the offender was at risk to reoffend, had demonstrated no remorse or apparent insight into the criminality for which he had been convicted and he had continued to offend while on bail. The only mitigating factors were that the offender was only 18 years of age when the crimes were committed, and the victim was not required to testify at trial.

85 At paragraph 25 Hill J. observed:

> [a]rmed robbery by a gang is a bold and cowardly crime. Law-abiding citizens should not expect to be subjected to violence anywhere ... In the circumstances of the crimes here, general deterrence and denunciation operate as the paramount sentencing principles. Given the contents of the PSR including that the offender was sentenced for assault only eight months prior to the robbery, individual deterrence in furtherance of protection of the community remains a critical concern.

86 Justice Hill concluded at paragraph 43 that the global sentence should be three and a half years' incarceration: 21 months for the robbery and 15 months for the use of the imitation firearm in addition to two years' probation. I note that this seemed to be an error since that added up to 36 months, not 42 months. A six-month sentence for the robbery while masked was imposed to run concurrently.

87 I concluded at para. 31 that the offences committed by Mr. McLaughlin were marginally less serious in that the complainants remained in their car and that the prospect for rehabilitation of Mr. McLaughlin was not as bleak as it was for K.G., although his criminal record was more serious. Otherwise I found the case was comparable and supported the Crown's position that a sentence in the range of three years was appropriate. After considering the aggravating and mitigating circumstances I imposed a 20-month sentence for using a firearm to rob the complainant and 16 months consecutive for using an imitation firearm while committing the robbery and given pre-sentence custody, two years' probation.

R. v. Wallace, *[2005] O.J. No 1759*, 2005 CanLII 14443 (ON SC) Cumming J.

88 The *Wallace* decision is also relied upon by Mr. Rodocker, who submitted that it was most on point in virtually all respects. Mr. Wallace had been convicted of eight counts of robbery, six counts of using an imitation firearm while committing the robberies, seven counts of wearing a mask with intent to rob, four counts of knowingly having possession of stolen property of a value under $5000.00 and two counts of using a credit card knowing it was stolen.

89 The robberies took place in deserted underground parking lots late at night over a period of nine days. A mask was used by Mr. Wallace and his accomplice. Justice Cumming found that the robberies were premeditated and planned, with care taken to maintain a disguise. An air pistol (having the appearance of a real firearm) was used as an imitation firearm which the Complainants reasonably considered to be a real firearm. The Complainants were threatened with giving up their modest personal belongings or being shot. In some instances, the weapon touched the head of the Complainant. The Complainants were searched. Mild force was sometimes used by pushing and grabbing and in one case, a brief struggle ensued with the robbers forcibly taking the Complainant's wallet. Some of the Complainants were women and a 10 year old child was present with his family on one occasion, although he was able to run away immediately. Justice Cumming stated that the Complainants impressed him as hard working, relatively poor people trying to make the best of their lives. They were understandably terrified by the threats made to them and feared for their lives.

90 Mr. Wallace was 21 and had two previous convictions as a youth for sex assault and theft under. Cumming J. noted at para. 15 that it was apparent that Mr. Wallace learned nothing from the consequences of his transgressions as a youth offender because the robberies commenced less than six months after his second conviction as a youth. The prospects for rehabilitation were considered modest as the offender took limited responsibility for his actions.

91 At para. 62, Cumming J. found that considering all the circumstances, a fit sentence was three years in respect of each of the eight robbery convictions, with each sentence imposed to be served concurrently; one year for each conviction for wearing a mask to be served concurrently; six months for each of conviction for possession of stolen property, to be served concurrently and six months for each conviction for use of a stolen credit card to be served concurrently. The three-year sentence for the robberies was to be followed by consecutive one-year terms for each of the six convictions for the use of an imitation firearm while committing robberies, resulting in a nine-year sentence.

92 I agree with Mr. Rodocker that Mr. Ulusow is a very different offender, given his post-conviction admission that he committed these offences. I do find it relevant, however, that the total sentence imposed was nine years. I appreciate that was mostly due to the impact of the stacking effect as a result of s. 85(4) of the *Criminal Code*, but had Cumming J. been concerned about the totality of the sentence as a result, he could have reduced the sentence he imposed on the robbery convictions.

93 Finally, I was referred to a number of decisions from the Ontario Court of Justice and I found the following to be of assistance.

R. v. Escott, 2014 O.J. No. 5596, (OCJ) DeFreitas J.

94 The offender in this case pleaded guilty to three counts of robbery, three counts of committing those robberies while wearing a disguise, one count of failing to comply with recognizance, and one count of failing to comply with a youth sentence. The substantive charges arose from a crime spree that took place over eight days during which the offender and two other men robbed three convenience stores while masked and brandishing knives. The offender had a youth record for theft, property offences and failing to comply with court orders and adult convictions for assault.

95 At para. 3 DeFreitas J. held that "the range of sentence for convenience store robberies is broad. An appropriate sentence on a plea of guilt can fall anywhere within the range of three to six years." [Emphasis added] Taking into account the fact the offender was just 20 years old, the mitigation that flowed as a result of his pleading guilty and co-operating with police, and the work the offender had done to address his addictions to narcotics and alcohol, DeFreitas J. concluded at para. 3 that a sentence of three years and nine months was appropriate "in light of the need for clear denunciation and deterrence."

R. v. Kewell, *2012 ONCJ 228*, *[2012] O.J. No. 1783* (OCJ) Borenstein J

96 While wearing a mask and hoodie and armed with knife, the offender entered a convenience store and took cash from a clerk, who suffered small cuts to his hands. The offender was 20 years old at time of offence and had six prior robbery convictions and numerous breaches of court orders. He was bound by numerous probation orders and on weapons prohibition at time of robbery. He never knew his father and his mother, was addicted to drugs and alcohol, suffered from Fetal Alcohol Effects, and had been a Crown ward living in numerous group and foster homes since the age of 12. In the months prior to the robbery the offender was using alcohol, marijuana, and ecstasy regularly. Without appropriate treatment, offender's conduct disorder, together with his anger and substance abuse issues, left him at high risk to reoffend. The offender pleaded guilty to robbery, possession of a weapon, wearing a disguise, and breach of probation.

97 At para. 48 Borenstein J. noted that the case law emphasizes the importance of protecting vulnerable storekeepers from robbery, but they also stress the importance of rehabilitation for youthful offenders. At para 49 he referred to the Court of Appeal's decision in *Boyle* and the fact that in that decision the Court of Appeal commented upon the vulnerable nature of storekeepers. At para. 58, Borenstein J. concluded that in light of cases such as *Boyle* and others, "a sentence of four years less pre-sentence custody is a fit sentence. It is a restrained sentence. It balances protection of the public with the fact that Mr. Kewell is still young and gives him the opportunity to choose to take advantage of the counselling and other programming available to him in the penitentiary." [Emphasis added]

R. v. Bouwman, *2012 ONCJ 671*, *[2012] O.J. No. 5063*, (OCJ) Baldwin J.

98 In *Bouwman*, the offender and his accomplice robbed a pharmacy while masked with the offender pointing his imitation firearm, a pellet gun, at the pharmacy's owner. They stole some cash from the cash register, some medication and an unknown number of Oxycontin pills while making repeated threats to owner's life if he did not cooperate and stating that he knew he was going to jail soon and that it did not matter. After an aborted attempt at another pharmacy, the offender and his accomplice entered a third pharmacy with their faces covered and again with the pellet gun, where a female owner was working. They sole cash and numerous drugs. The offender was 35 years old with no prior record, suffered from schizophrenia and was drug addict on methadone program. He had family support and was engaged to marry and had a son. By the time of sentencing he had managed to become opiate free. The offender pleaded guilty to two counts of robbery and one count of using an imitation firearm. He was sentenced to 23 months' incarceration (six months for one robbery and five months for the other plus one year concurrent for the use of an imitation firearm) followed by three years' probation.

Additional Cases

99 The Crown also provided a copy of *R. v. John*, *2016 ONSC 396*, *[2016] O.J. No. 520*, a decision of Garton J. However, in that case a firearm was used to rob a convenience store and Garton J. held that s. 344(1) (a.1) of the *Criminal Code*, which provides for a mandatory minimum sentence of four years for robbery where a firearm, was applicable and so I did not find this decision of assistance. The same is true of *R. v. Stoddart*, *[2005] O.J. No. 6076*. As for the cases provided by the Crown from British Columbia and Alberta, given that there is ample authority to refer to from Ontario, I did not find it necessary or helpful to consider these cases.

Collateral Immigration Consequences for Mr. Farah

100 It is the position of Mr. Cohen that because Mr. Farah is a permanent resident, and not yet a Canadian citizen, any sentence of more than six months on a particular count will result in his "automatic deportation" from Canada. Mr. Cohen submits that because of s. 85(4) of the *Criminal Code*, Mr. Farah faces at least seven consecutive one-year mandatory minimum sentences and if the section is not found unconstitutional I will not have any discretion to impose what he submits is a fit global sentence in the range of three to five years that would be capable of addressing the consequences of my sentence on Mr. Farah's immigration status. Mr. Cohen's proposed solution is that I sentence Mr. Farah on each of his various convictions in sentences each of six months less one day, all to run consecutively, until they add up to what I determine is a fit a global sentence.

101 By virtue of his convictions Mr. Farah will be considered "inadmissible on grounds of serious criminality" pursuant to s. 36(1)(a) of the *Immigration and Refugee Protection Act*, *S.C. 2001, c. 27* ("*IRPA*"). This would make him vulnerable to a removal order leading to deportation. He would not be able to appeal any removal order made by the Immigration Division to the Immigration Appeal Division, by virtue of s. 68(1) of the IRPA, if on any one conviction he is sentenced to more than six months. Although defence counsel typically refer to this

consequence as "automatic deportation", as I explained in *R. v. Blake*, 2020 ONSC 5658 at paras. 67-68, based on my review of the *IRPA*, Mr. Farah will not face automatic deportation as he would still have a potential remedy; the Immigration Appeal Division may stay or quash a removal order where humanitarian and compassionate considerations so warrant. I therefore disagree with Mr. Cohen that Mr. Farah would not be able to argue that he has been rehabilitated and deserving of consideration given his young age and lack of criminal antecedents.

102 In any event, the issue before me is whether or not I can allocate what I determine to be a fit global sentence in the manner suggested by Mr. Cohen to Mr. Farah's convictions. He did not provide any support for his position.

103 In considering this issue I begin with the general principles applicable to sentencing an offender for multiple convictions. Where there is no relationship between the separate commissions of criminal offences, the court should, bearing in mind the total term, impose consecutive sentences: *R. v. Chisholm*, [1965] 2 O.R. 612 (C.A.). The approach to sentencing an offender for multiple offences in Ontario is to identify a proper global sentence that reflects the gravamen of the overall criminal conduct, and then impose individual sentences that add up to the total sentence. The Court of Appeal for Ontario first explained this approach in *R. v. Jewell* (1995), 83 O.A.C. 81, at para. 27:

> In my view, the appropriate approach in cases such as the two under appeal is to first, identify the gravamen of the conduct giving rise to all of the criminal offenses. The trial judge should next determine the total sentence to be imposed. Having determined the appropriate total sentence, the trial judge should impose sentences with respect to each offence which result in that total sentence and which appropriately reflect the gravamen of the overall criminal conduct. In performing this function, the trial judge will have to consider not only the appropriate sentence for each offence, but whether in light of totality concerns, a particular sentence should be consecutive or concurrent to the other sentences imposed.

104 The Court of Appeal has consistently applied *Jewell: R. v. Stuckless*, 2019 ONCA 504, 146 O.R. (3d) 752: see *R. v. J.H.*, 2018 ONCA 245, *R. v. Ahmed*, 2017 ONCA 76, 136 O.R. (3d) 403, and *R. v. B. (R.)*, 2013 ONCA 36, 114 O.R. (3d) 465.

105 With respect to the individual sentences, "the sentence for each offence must properly reflect the most serious part of the overall criminal conduct and must reflect the proper sentence for that offence. [Emphasis added.]": *R. v. B. (R.)*, at para. 30. As Moldaver J.A. (as he then was) explained in *R. v. Badhwar*, 2011 ONCA 266, 280 O.A.C. 273, at para. 45, "[c]ourts ought not to be imposing inadequate or artificial sentences at all ...". The Supreme Court of Canada put it this way in *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739, at para. 14: "The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. [Emphasis added.]"

106 Furthermore, in addition to the principles cited above, the Court of Appeal and the Supreme Court have made it clear that a sentencing judge cannot impose a global sentence which consists of unfit consecutive individual sentences on the basis of collateral immigration

consequences. Two Court of Appeal decisions are arguably dispositive on this point: *R. v. Badhwar* and *R. v. B. (R.)*. In *Badhwar*, the appellant sought to appeal his sentence by realigning two individual consecutive sentences for the purpose of circumventing the provisions of the *IRPA*, which prevented him from appealing, as of right, the deportation order he was facing as a result of his conviction and sentence on the charge of criminal negligence causing death. Specifically, the appellant sought to reduce his sentence of 30 months (less 5 months for pretrial custody) on the charge of criminal negligence causing death to 23 months, and to increase his sentence of 12 months consecutive for failing to stop at the scene of an accident to 19 months (less 5 months for pretrial custody).

107 In dismissing the appeal, at para, 43, the Court of Appeal cited its earlier decision in *R. v. Multani*, *2010 ONCA 305*, *261 O.A.C. 107*, and explained that "while the deportation consequences of the sentence may be a proper factor to consider in determining the appropriate sentence in certain cases, immigration consequences cannot take a sentence out of the appropriate range". The court also observed at para. 45 that "[n]o matter how one chooses to come at the issue, the bottom line remains [that] [c]ourts ought not to be imposing inadequate or artificial sentences at all, let alone for the purpose of circumventing Parliament's will on matters of immigration." [Emphasis added] The Supreme Court quoted this paragraph with approval in *Pham*, at para. 17. As the court held in *Pham*, "deportation consequences of the sentence may be a proper factor to consider in determining the appropriate sentence in certain cases, immigration consequences cannot take a sentence out of the appropriate range."

108 The Court of Appeal considered a similar argument two years later in *B.(R)*. There, the appellant sought to apportion a global sentence of five years differently so as to avoid the consequences of s. 64(1) of the *IRPA*. At trial, the appellant was sentenced as follows: on count 1, sexual assault, 5 years; on count 2, sexual interference, 5 years (concurrent); on count 3, invitation to sexual touching, 1 year (concurrent); and on count 4, sexual exploitation, 4 years (concurrent). Before the Court of Appeal, the appellant requested a maximum sentence of two years less a day for counts 1, 3 and 4, (count 2 was stayed) all to run consecutively so as to maintain the total sentence of five years. Following its decision in *Badhwar* and dismissing the appeal, the Court of Appeal observed at para. 27 that imposing "a sentence of 2 years less a day for either of counts 1 or 3 would be patently "inadequate or artificial" because the proper range of sentence for prolonged sexual assault including intercourse on single child by a person in a position of trust was five or six years".

109 Mr. Cohen submitted that the facts in *Nassri* are relatively similar to the facts of the case at bar and argues that a sentence of six months less a day would be an appropriate sentence on the individual robberies Mr. Farah has been convicted of, all to run consecutively, in support of his proposed solution to allow Mr. Farah to avoid the near automatic consequences of deportation. I have already explained why I would distinguish *Nassri* from the case at bar. In my view, regardless of how I decide the Defence *Charter* application, given the authorities I have been referred to, a sentence on each of Mr. Farah's convictions of six months less one day would not reflect the most serious part of his overall criminal conduct or be a proper sentence for all of those offences and would clearly be imposing inadequate or artificial sentences for the purpose of circumventing Parliament's will on matters of immigration.

110 For these reasons I conclude that the collateral immigration consequences Mr. Farah will face as a result of his sentences in this case cannot be addressed in the manner suggested by Mr. Cohen.

Pre-Sentence Credits

111 Mr. Farah was arrested on June 22, 2017 and released on bail on August 8, 2017 after spending 48 days in custody. At a credit of 1.5:1 that amounts to a pre-sentence credit ("PSC") of 72 days or two month and 12 days. Once released, Mr. Farah was subject to strict house arrest unless he was in the company of one of his two sureties. That bail was varied on April 16, 2018 to add that Mr. Farah could seek employment or go directly to and from work. Mr. Cohen submitted that Mr. Farah should receive a *Downes* credit as a result for one quarter of his time on bail of about 38 months or nine and one-half months. Ms. Bradstreet submitted that the credit pursuant to *R. v. Downes*, (2006), 79 O.R. (3d), (Ont. C.A.) for Mr. Farah should only be four months.

112 Mr. Ulusow was also arrested on June 22, 2017 and he was in custody for 28 days until July 19, 2017, when he was released on bail. He was re-arrested on October 29, 2018 for breaching the terms of his house arrest and spent another 200 days in custody until he was released in error on May 16, 2019. He turned himself in and was arrested again on May 27, 2019 and spent nine days in custody until he was released on June 4, 2019. Mr. Ulusow's total time in custody was 237 days, but 15 days are attributable to his sentence for breaching his bail. This results in 222 days in custody on these charges which, enhanced at 1:1.5, results in a pre-sentence credit of 333 days or 11 months and three days.

113 Mr. Ulusow also seeks a *Downes* credit of one quarter of the time he was on bail. He was on a strict house arrest bail from his release on July 19, 2017 until October 25, 2017, during which time he was only able to be out of his house in the presence of one of his two sureties. His terms of release were varied on October 25, 2017 so that he was also allowed out of his house to go to work between 6 a.m. and 6 p.m. and on May 30, 2018 to also allow him to go to Humber College and on July 10, 2018 to also allow him to work at the Metro Distribution Centre, which lasted until May 27, 2019. When he was released again on June 4, 2019, he was back on strict house arrest with the sole exception that he could only be out with a surety, no doubt because of his prior breach of bail conditions. Mr. Ulusow's total time on bail was about 32 months. A quarter of that time would be eight months. Ms. Bradstreet submitted that the *Downes* credit for Mr. Ulusow should only be three months.

114 Based on this information, for most of the time that the Defendants were under house arrest, there were exceptions for work and school which they took advantage of.

The Defence Charter Application

115 By virtue of s. 85(4) of the *Criminal Code*, there is no dispute that absent my declaring this section unconstitutional, the sentences imposed for the convictions of robbery while using an imitation firearm must not only be consecutive to the other sentences imposed but consecutive

to each other: see *R. v. Boucher*, [1986] 1 S.C.R. 750; *R. v. Herrell* (1994), 88 C.C.C. (3d) 412 (Ont. C.A.). The law is clear that a separate offence contrary to this section was committed by the Defendants in each robbery as they used an imitation firearm in the commission of the robbery, notwithstanding that these offences took place within a short time of each other and involved the same imitation firearm: see *R. v. Woods* (1982), 65 C.C.C. (2d) 554 (Ont. C.A.). The Supreme Court of Canada has held that this may result in a number of consecutive sentences even if the offences arose out of the same series of events: see *R. v. Brown*, [1994] 3 S.C.R. 749, C.C.C. (3d) 97 (S.C.C.). Accordingly, there is no dispute that if s. 85(4) is constitutional that Mr. Farah faces seven consecutive one-year mandatory minimum sentences and Mr. Ulusow faces six one-year mandatory minimum sentences consecutive to any other sentence imposed on their other convictions.

116 The Defendants seeks a determination of whether the requirement of consecutive sentences for using an imitation firearm in the course of committing an indictable offence under section 85(4) of the *Criminal Code* violates the prohibition against cruel and unusual punishment guaranteed by section 12 of the *Charter*. The Defendants assert that in light of the particular circumstances in this case such a sentence constitutes cruel and unusual punishment, not only for them but also for a reasonable hypothetical offender. It is their position that s. 1 of the Charter cannot save this violation.

Is this Court bound by Court of Appeal authority to dismiss the Defence application?

117 The first issue I must consider is whether the Court of Appeal for Ontario's s. 12 *Charter* analysis of ss. 85(3) and (4) of the *Criminal Code* in *R. v. Kinnear*, 2005 CanLII 21092 (C.A.), *R. v. Meszaros*, 2013 ONCA 682, and *R. v. Superales*, 2019 ONCA 792, is binding on this court in light of the Supreme Court of Canada's guidance on conducting the s. 12 inquiry in *R. v. Nur*, 2015 SCC 15. When I asked Mr. Rodocker what his position was on this issue, he frankly and fairly conceded that he was perplexed in his ability to respond and that he could not say that *Nur* had resulted in a change in the law that would make these earlier cases distinguishable. Based on my review of the these and several of the decisions cited therein, I have concluded that I am bound by these decisions to dismiss the Defendants' Charter application. My reasons are as follows.

R. v. Nur

118 In *Nur*, the majority of the Supreme Court articulated a two-step test for infringement of s. 12, drawing on, among other things, three of its earlier decisions in which it considered "reasonable hypotheticals". While there is no discussion of the s. 12 framework in *Superales*, in both *Kinnear and Meszaros*, the Court of Appeal applied essentially the same two-step test, citing, in both cases, two of the Supreme Court decisions on which the majority in *Nur* relied. Below I discuss each of these cases in turn.

119 *Nur* was an appeal from a decision of the Court of Appeal finding unconstitutional the mandatory minimum sentences imposed by s. 95(2)(a) of the *Criminal Code* on the basis of cruel and unusual punishment, contrary to s. 12 of the *Charter*. In affirming the decision below, the Supreme Court clarified the test for infringement of s. 12, which was a subject of

disagreement between the appellant Crown and the respondents. Writing for the majority, McLachlin C.J.C. described the two-part test as follows, at para. 77:

> In summary, when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If the answer is no, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others. This is consistent with the settled jurisprudence on constitutional review and rules of constitutional interpretation, which seek to determine the potential reach of a law; is workable; and provides sufficient certainty.

120 In arriving at this framework, the majority rejected the submissions of the appellant, supported by other Attorneys General, that the primary or exclusive focus of the s. 12 inquiry should be the offender before the court (paras. 48-49). Among other things, the majority observed that the appellant's argument was inconsistent with several of its earlier decisions in the s. 12 context in which the court considered "reasonable hypotheticals", citing three cases: *R. v. Smith*, *[1987] 1 S.C.R. 1045*, *R. v. Goltz*, *[1991] 3 S.C.R. 485*, and *R. v. Morrisey*, *2000 SCC 39*, *[2000] 2 S.C.R. 90*. In the words of McLachlin C.J.C. at paras. 52-57:

> The argument that the focus should be mainly or exclusively on the offender before the court is also inconsistent with the jurisprudence of the Court on the review of mandatory minimum sentences under s. 12 of the Charter. The cases have sometimes referred to this review as proceeding on "reasonable hypotheticals". The Attorney General of Ontario concedes that the cases under s. 12 support looking beyond the circumstances of the offender before the court, but asks us to overrule them. She says the cases on what constitutes a "reasonable hypothetical" are "irreconcilable". A review of the cases does not, with respect, support this contention.

121 The first case to consider the question was *Smith*. The majority of the court, per Lamer J. (as he then was), struck down a seven-year mandatory minimum sentence for importing narcotics on the basis that the law could catch a student driving home to Canada from the United States with her first joint of grass. The court acknowledged that a long prison sentence was appropriate with few exceptions for people who import drugs into the country, but held that because it could catch people for whom the seven-year minimum sentence would be grossly disproportionate, it violated the s. 12 guarantee against cruel and unusual punishment.

122 A few years later in *Goltz*, the court, per Gonthier J. for the majority, confirmed that a s. 12 review of mandatory minimum sentencing laws may look at cases other than that of the offender, and commented on the scope of that review. Laws should not be struck down as unconstitutional on the basis of examples that were unlikely ever to arise. The focus must be on "reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases" (p. 506 (emphasis in original)). The Court upheld a minimum sentence of seven days' imprisonment for driving while prohibited.

123 Once again, in *Morrisey*, the majority of the court, per Gonthier J., stressed that the "reasonableness of the hypothetical cannot be overstated" (para. 30). The court upheld a four-year mandatory minimum sentence for criminal negligence causing death by using a firearm.

R. v. Kinnear

124 *Kinnear* was, among other things, an appeal from a trial judge's declaration that s. 85(4) of the *Criminal Code* is unconstitutional. In setting aside the declaration, the Court of Appeal observed that the trial judge's analysis of s. 12 was inconsistent with binding Supreme Court authority. Doherty J.A. explained as follows at paras. 64-65 (emphasis added):

> Finally, to the extent that the reasons of the trial judge reveal any analysis of s. 12, that analysis is inconsistent with the approach followed in binding authority from the Supreme Court of Canada and this court: see R. v. Goltz(1991), *67 C.C.C. (3d) 481* (S.C.C.); R. v. Morrisey *(2000), 148 C.C.C. (3d) 1* (S.C.C.); R. v. McDonald *(1998), 127 C.C.C. (3d) 57* (Ont. C.A.).

125 In *McDonald*, at para. 16, Rosenberg J.A. admirably described the approach to be taken to claims that a sentence contravened s. 12 of the Charter:

> The sentencing provision will be found to infringe s. 12 if it would provide for and would actually impose a sentence that is so excessive or grossly disproportionate as to outrage decency in the particular circumstances of this offender. When the particular facts of the case do not result in gross disproportionality, the court moves to the second stage and it must consider whether the impugned provision would impose a grossly disproportionate punishment in reasonable hypothetical circumstances. If so, the section will be found to violate s. 12. Finally, if the court is persuaded that there is a violation of s. 12, it must consider whether the provision can be saved as a reasonable limit under s. 1 of the Charter.

126 Thus, while the Court of Appeal's decision in *Kinnear* pre-dates the Supreme Court's decision in *Nur*, the test described in the former was essentially the same as the test articulated in the latter.

R. v. Meszaros

127 *Meszaros*, like *Kinnear*, was a sentence appeal among other things. The appellant argued that the mandatory minimum sentence of one year's imprisonment imposed by s. 85(3)(a) of the *Criminal Code* was unconstitutional because it violated s. 12. In rejecting the appellant's s. 12 argument, the Court of Appeal noted that it relied on the principles canvassed by Doherty J.A. in *R. v. Nur*, *2013 ONCA 677* (at para. 75), which were referenced by the Supreme Court in *Nur*. The Court of Appeal further cited the Supreme Court's decisions in *Goltz* and *Smith* (at para. 76), and explained that "the s. 12 analysis involves two enquiries: (i) whether the punishment would be grossly disproportionate in comparison to what would otherwise have been appropriate for the offender in question; and, if not (ii) whether the punishment can be said to be grossly disproportionate having regard to what the jurisprudence refers to as other 'reasonable hypothetical circumstances'. [emphasis added]" (at para. 77). In short, like in the case of *Kinnear*, the s. 12 test referenced in *Meszaros* was essentially the same as the test outlined in *Nur*.

R. v. Superales

128 Unlike the other two decisions, it is not possible to determine whether, on the face of the decision itself, the Court of Appeal's s. 12 analysis in *Superales* was consistent with the framework set out in *Nur*. While the Court of Appeal set aside the trial judge's declaration that s. 85(3)(a) of the Criminal Code is invalid, it did not offer any real reasons for its decision. That said, *Superales* was decided after the Supreme Court's decision in *Nur*. I also note that the trial judge in *Superales*, *2018 ONSC 6367*, did not consider the appellate authority of our Court of Appeal that I have been referred to.

R. v. Antwi, *2016 ONSC 4325* (CanLII)

129 The "stacking" principle related to s. 85(4) was challenged in *Antwi*. The offender was convicted of attempt robbery and was sentenced to six years. A subsequent trial on related charges led to convictions for robbery. The offender was left in a situation where the subsequent related robbery charges would be stacked upon the six-year sentence he had already received for the attempted robbery. Fragomeni J. struck down s. 85(4), stating:

> I am satisfied that section 85(4) is unconstitutional and cannot be saved pursuant to section 1 of the *Charter*. The issue before me at this application related solely to the constitutional validity of section 85(4). The essence of the Applicant's position related to the stacking effect of consecutive one year sentences and in doing so would result in grossly disproportionate sentences, not only for the Applicant but also for reasonable hypothetical offenders.

130 The court in *Antwi* did not consider the argument made before me that the Appellate authority I have reviewed that considered the constitutionality of s. 85(4) is binding. Given my conclusion that it is, obviously I cannot follow *Antwi* even if I agreed with the conclusion. Furthermore, as Mr. Coristine submitted, the court did not provide any analysis as to why that reasonable hypothetical offender offended s. 12 of the *Charter*, as required by the Supreme Court in *Nur*.

131 As Mr. Coristine submitted, the decisions from our Court of Appeal that have found s. 85 to be constitutional are consistent with appellate courts from other provinces: see for example *R. v. Al-Isawi*, *2017 BCCA 163* (which at paras. 41-48 held that the Supreme Court in *R. v. Brown*, *[1994] 3 S.C.R. 749* held that the mandatory one-year minimum and its consecutive nature does not infringe s. 12 of the Charter when the underlying offence is robbery, and that the fact the decision in *Brown* involved a real firearm "makes no difference". Like in *Brown*, the court in *Al-Isawi* limited its holding to cases where the underlying offence is robbery) and *R. v. Stewart*, *2010 BCCA 153*.

In the alternative, what is my conclusion on the merits of the Defence application?

132 Given that the *Charter* application was fully argued before me, I am prepared to consider how I would have decided the Defence application had I not concluded that I was bound by appellate authority to dismiss it.

133 In accordance with the framework set out in the Supreme Court of Canada's decision in

Nur at para. 77, a s. 12 constitutional challenge raises two questions. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court [the Particularized Inquiry]. If the answer is no, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others [the Reasonable Hypothetical Inquiry]. If the answer to either of these questions is "yes", the minimum sentence provision is *prima facie* in violation of s. 12, and the court must consider whether it is saved under s. 1 of the *Charter*. If I come to that conclusion the Crown does not suggest that s. 85 could be saved by s. 1 of the *Charter*.

134 Section 12 of the *Charter* enshrines "the right not to be subjected to any cruel and unusual treatment or punishment". A law will violate s. 12 if it imposes a "grossly disproportionate sentence" on the individual before the court, having regard to the nature of the offence and the circumstances of the offender, or if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others: *Nur*, at paras. 39 and 77. "Cruel and unusual" punishment is a "high bar": *Nur* at para. 39, requiring the punishment to be "so excessive as to outrage standards of decency" and considered by Canadians as "abhorrent and intolerable": *R. v. Lloyd*, *2016 SCC 13*, at para. 24. In *Lloyd* at para. 33 the majority described a grossly disproportionate sentence as one that would "shock the conscience of Canadians."

The Particularized Inquiry

135 The Defendants submitted that the requirement of consecutive sentences under s. 85(4) of the *Criminal Code* results in a grossly disproportionate sentence for them. As already stated, by virtue of s. 85(4) the minimum sentence that must be imposed on Mr. Farah is seven years, and on Mr. Ulusow, six years. Both defendants also stand convicted of further offences including a conspiracy to rob, multiple counts of robbery, a single count of an attempted robbery and multiple counts of wearing a face mask. It is submitted that the effect of s. 85(4) would be to impose a crushing sentence on both Defendants who were, at the time of being charged with these offences, without prior criminal record. It is also argued that such sentences would fail to meet the principle of totality and ignore their rehabilitative potential and that such sentences are therefore grossly disproportionate.

136 As the court stated in *Nur* at paras. 40 -41, in considering this first question, I must take into account both the principles of sentencing, as set out in s. 718 of the *Criminal Code*, and any aggravating and mitigating factors, including those listed in s. 718.2(*a*)(i) to (iv). The principles of sentencing are as follows: the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(*b*)); the principle that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh (s. 718.2(*c*)); and the principle that courts should exercise restraint in imposing imprisonment (ss. 718.2(*d*) and (*e*)), and in reconciling these different goals, the fundamental principle of sentencing under s. 718.1 of the *Criminal Code* that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

137 In light of this test and the sentencing cases I have reviewed, I agree with Mr. Coristine's submission that s. 12 of the *Charter* is not infringed because s. 85(4) does not demand grossly disproportionate punishment for multiple incidents of using an imitation firearm to commit an

indictable offence. First of all, a sentence in the range of eight years, or what the mandatory minimum would demand in this case of six years for Mr. Ulusow and seven years for Mr. Farah, could not be considered grossly disproportionate to a sentence of five years which the Defendants have conceded would be a fit sentence. A sentence in the range of seven to eight years would not shock the conscience of Canadians given the circumstances of these series of robberies despite the youth and rehabilitation potential of the Defendants.

138 In *R. v. McDonald* [1998] O.J. No. 2990 (C.A.), at paras. 4-9, 72, the court upheld a four-year minimum sentence for robbery with a firearm in a case involving an unloaded firearm. *McDonald* involved a young man with a mental illness who committed a robbery of a fast-food outlet with an unloaded BB gun, which he had tucked into his pants and displayed to the clerk in the course of the robbery. On these facts, Rosenberg J.A. held at para. 72 :

> I am not convinced that having regard to the objective gravity of any offence involving the use of a firearm, even an unloaded one, that a sentence approaching four years shocks the conscience.

139 The fact that a four-year sentence is not grossly disproportionate for displaying a real unloaded firearm in a single robbery undermines the contention that a five to seven year sentence is grossly disproportionate for a series of six or seven robberies at gunpoint involving an imitation firearm, let alone where physical violence was used and injuries were suffered. Both real and imitation firearms can quickly escalate a situation leading to both physical and psychological harm. For most Complainants, there is no difference between a real unloaded firearm and an imitation firearm. The use of either is an inherently violent and threatening act that amply justifies a custodial sentence.

140 It is also apparent, as submitted by Mr. Coristine, that ss. 85(3)(a) and (4) are not vulnerable on the theory advanced in the Supreme Court's decisions in *Nur* and *Lloyd* -- *i.e.* minimum sentences for offences that can be committed in many ways are constitutionally suspect. Although the sentences at issue in this case attach to an offence that can be committed in many ways, unlike in this case, in *Nur* the offence at issue could be committed in ways involving minimal blameworthiness and harm. A licensed gun owner could be convicted under s. 95 of the *Criminal Code* simply for having stored a firearm in the wrong place, even a safe place in circumstances in which the offender had no intention to harm anyone. There is no blameless and harmless way to use an imitation firearm to commit an indictable offence. Section 85(2)(a) applies to a narrow range of conduct in that pursuant to s. 84, it only applies to an "imitation firearm" and an obviously fake firearm would be excluded. Furthermore, the imitation firearm must be "used" in the commission of an indictable offence. Pursuant to *R. v. Steele*, 2007 SCC 36, at paras. 27-33, merely possessing an imitation firearm during a crime does not constitute "use".

141 Finally, liability under s. 85(2) depends on a separate finding of guilt for the underlying indictable offence in which the imitation firearm was used. It is insufficient that the offender used an imitation firearm in conduct that could be charged as an indictable offence. The underlying conduct must in fact result in a charge, and a conviction: see *R. v. Andrade*, 2015 ONCA 499, at para. 29, leave ref'd, [2015] S.C.C.A. No. 347.

142 As for the collateral immigration consequences that Mr. Farah will face, for the reasons already stated, the law is clear that immigration consequences cannot allow a sentence to depart from the appropriate range and so those consequences cannot be used to find that the minimum sentence in this case would be grossly disproportionate.

143 The totality principle cannot be used to frustrate the will of Parliament through the imposition of artificially low sentences or illegal sentences that simply ignore the mandatory minimum. However, within those confines, the law does not require a sentencing judge to simply add the proscribed minimum sentence under s. 85(4) on to the fit sentence for the underlying offences, in this case robbery. Rather, the totality principle applies to all offences that are not covered by a mandatory minimum. Therefore, this Court may adjust the sentences for all other offences to account for the fact that a mandatory one-year minimum consecutive sentence was required under ss. 85(3)(a) and (4) for using an imitation firearm and make adjustments to ensure that the aggregate sentence is fit: see *R. v. Stauffer*, 2007 BCCA 7, at paras. 32-45. In other words, the mandatory minimum does not oust my jurisdiction with respect to the sentence on the underlying indictable offence or offences, provided the sentence I impose respects the minimum sentence required. Non-custodial sentences may be imposed for underlying offences where consistent with the purposes and principles of sentencing. In an appropriate case, a court could attach the minimum sentence under s. 85(3)(a) to a discharge, suspended sentence or a conditional sentence; *Meszaros, supra* at paras. 84-85.

144 Credit for presentence custody can also be deducted from a minimum sentence of imprisonment: see *R. v. Wust*, 2000 SCC 18, at para. 9. Accordingly, there is no doubt that I can apply the usual *Summers* credit of a reduction of 1.5 days for each day spent in pre-sentence custody even if it brings the sentence I impose below the mandatory minimum imposed by s. 85 (4) of the *Criminal Code*.

145 I accept however that I cannot take into account pre-sentence time spent on bail. The *Downes* principle is specifically not applicable when a court is imposing a mandatory minimum. In *R. v. Panday*, 2007 ONCA 598 at paragraphs 21-44, Justice MacPherson, speaking for the court, drew this conclusion by distinguishing strict bail and actual incarceration when taking into account those sentencing provisions of the *Criminal Code* which address pre-sentence calculations, specifically ss. 719(3) and 742.1. In this case, however, for the most part the Defendants were able to work and/or go to school and so the *Downes* credit in my view is not so significant that it would render the mandatory minimum sentence required in this case to be considered grossly disproportionate.

146 For these reasons I find that the mandatory consecutive minimum sentences for use of an imitation firearm during the commission of an offence, required in this case by s. 85(4) of the *Criminal Code*, does not give rise to grossly disproportionate sentences in the circumstances of the case at bar.

The Reasonable Hypothetical Offender

147 Notwithstanding that I have concluded that the mandatory minimum sentence for use of an

imitation firearm required by s. 85(4) in this case is not disproportionate to the particular offenders in this case, I must still consider whether or not this minimum sentence gives rise to a grossly disproportionate sentence in reasonable hypothetical circumstances as well. This second stage of the analysis requires the court to conduct an inquiry into the "range or scope of the law." The matter is essentially one of statutory interpretation as the court must consider the "reach" of the law and what kind of conduct the law may reasonably be expected to catch: *Nur*, at paras. 60-61.

148 This second question was the focus of Mr. Rodocker's submissions as he conceded that he could not argue that the six year minimum sentence Mr. Ulusow would face as a result of s. 85(4) minimum would result in a grossly disproportionate sentence for him. Mr. Cohen submitted that Mr. Farah was the hypothetical offender but that was premised on this Court being able to manipulate a global sentence to avoid the immigration consequences, which I have already stated cannot be done in any event.

149 In *Nur*, Chief Justice McLachlin emphasized the importance of keeping in mind the "reasonable" aspect of a "reasonable hypothetical." The reasonable hypothetical must be one that may reasonably be expected to arise, and not one that is "far-fetched" or "marginally imaginable." The hypothetical scenario must be one that would normally lead to criminal charges and a finding of guilt. While the reasonable hypothetical may take into account personal characteristics relevant to persons who may be caught by the mandatory minimum sentence, the inquiry must be grounded in common sense and experience. The construction of the reasonable hypothetical must exclude "using personal features to build the most innocent and sympathetic case imaginable -- on the basis that almost any mandatory minimum sentence could be argued to violate s. 12 and lawyerly ingenuity would be the only limit to findings of unconstitutionality." See *R. v. Al-Isawi*, *2017 BCCA 163* (, citing *Nur*, at paras. 57, 62, 75.

150 The Defendants referred to *McDonald, supra.* at para. 82 where the Court of Appeal noted:

> [n]either pre-trial custody nor a minimum four-year sentence alone would, in and of themselves, amount to gross disproportionality. However, [there could be] ... reasonable hypothetical circumstances where the combination of the two factors could result in gross disproportionality.

151 I do not find this statement determinative of the issue as the court in *McDonald* was not actually considering a hypothetical.

152 The Defendants also rely on the fact that the Court of Appeal in *R. v. R.K.*, *[2005] O.J. No. 2434* (C.A.) at paras. 57 - 58 and in *R. v. Rocheleau*, *2013 ONCA 679* at para. 34 applied *R. v. Kienapple*, [1975] 1 S.C.R. 72 to stay the mandatory minimum sentence required by a conviction for use of a firearm in committing an offence, and thus avoiding the need to consider the constitutionality of the minimum sentence. In my view those cases do not suggest, as submitted by the Defendants, that the Court of Appeal intended to give effect to Parliament's intent to punish and deter the criminal misuse of firearms while ensuring that the mandatory minimum sentences were not so excessive as to violate the prohibition against cruel and unusual punishment. In my view these decisions simply turned on the proper application of the *Kienapple*

principle, not because the court was of the view that a mandatory minimum sentence would result in a grossly disproportionate sentence.

153 The Defendants rely on *Antwi*, but as I have already said, I cannot follow *Antwi* even if I agreed with the conclusion. The Defendants have offered the same hypothetical offender scenario as submitted in *Antwi*. As I am considering the merits of the application, in the alternative, I could have regard to the analysis of the court in *Antwi*, but as Mr. Coristine submitted, the court did not provide any analysis as to why that reasonable hypothetical offender offended s. 12 of the *Charter*, as required by the Supreme Court in *Nur*.

154 The hypothetical offered by the Defendants for the reasonable hypothetical to illustrate how section 85(4) would result in a grossly disproportionate sentence is as follows:

> An 18-year old female with no criminal record with a low IQ is drawn into a cult. The cult members commit robberies to fund their activities. The female acts as a lookout on two occasions while her fellow members rob a grocery store. On one occasion one of the robbers is armed with an imitation firearm while in the second she uses a real firearm. On both occasions, the grocery store clerk is locked in the closet during the robbery. The female never leaves the car during the robberies and has no contact with the firearms or the victims. The cult members are eventually caught and arrested. The female is charged and convicted of two counts of robbery (s. 344(1)(b), one count of robbery with firearm (s. 344(1)(a.1) which carries with it a mandatory minimum sentence of four years), two counts of forcible confinement (s. 279(2), one count of use imitation firearm while committing the offence of forcible confinement (s. 85(2), which carries with it a one-year mandatory minimum sentence to be served consecutively) and one count of use firearm while committing the offence of forcible confinement (s. 85(1), which carries with it a one year mandatory minimum sentence to be served consecutively).
>
> In total, the female hypothetical offender would net a sentence of 6 years (the 4 year mandatory minimum sentence for robbery with a firearm + 1 year for use imitation firearm + 1 year for use firearm -- all to be served consecutively by virtue of section 85(4). A six-year sentence for this first-time female offender is grossly disproportionate. It does not accord with recognized sentencing principles, including the principles of totality and rehabilitation, and such a sentence would outrage reasonable Canadians' standards of decency. Section 85(4) therefore violates s. 12 of the Charter.

155 Therefore, to consider that analysis, I have had regard to the many questions set out by Mr. Coristine in his factum. I won't repeat them all here, but his questions raise factual questions and serious questions on its face as to whether or not the hypothetical offender would even be convicted in the first place.

156 I agree with the Crown's submission that the hypothetical scenario advanced by the Defendants on its face is not a reasonable hypothetical. As Mr. Coristine submitted, it reads more like something conceived of by a group of lawyers, rolling a series of plausible facts into one larger implausible scenario in order to undo a mandatory minimum sentence that is otherwise constitutionally sound. That is precisely what the court in *Nur* cautions against.

157 Mr. Rodocker submitted that this hypothetical offender was never in the ATM and that this was very significant but that she was well aware of what was going on inside -- in other words her role was minimal but enough to find culpability. If this hypothetical offender was not the getaway driver -- she was just sitting in the car - I do not see how she would be convicted since the law is clear that mere presence at the scene of a crime does not equate to criminal liability: *R. v. Dunlop*, *[1979] 2 S.C.R. 881*. As Mr. Coristine submitted, if the only thing this reasonable offender knew was that they had guns, provided she did not actively encourage the others to use them I don't see how she could be a party to a use firearm offence.

158 If the facts in the hypothetical are amplified further to include actual knowledge of firearms and actual aiding or abetting both of the robberies, the hypothetical offender would appropriately attract a lengthy term of imprisonment. I do not agree with Mr. Rodocker that a fit sentence for would be three to four years and that the mandatory minimum sentence of six years would be grossly disproportionate. Perhaps the mandatory minimum would be at the high end of the range, but it would not in my view shock the conscience and be "grossly disproportionate" to a fit sentence. In *Kinnear*, at paras. 76-77 the Court of Appeal stated as follows:

> [76] The trial judge briefly addressed this aspect of s. 12 in his reasons. He offered up a hypothetical in which an accused was detained by more than two security guards and threatened each of the guards to make good his escape. The trial judge observed that s, 85(4) would require an additional minimum one year consecutive sentence for each guard threatened. He reasoned that at some point, the number of guards threatened would render the total sentence imposed grossly disproportionate.
>
> [77] The trial judge's hypothetical ignores the operation of the *Kienapple* rule. As indicated earlier in these reasons, *Kienapple* would preclude convictions for more than one charge of using a firearm to commit an indictable offence arising out of the same transaction. The use of a firearm to threaten several guards at the same time and the same place in order to effect an escape would support only one conviction for using a firearm while committing an indictable offence.

159 After referring to the passage from *McDonald* at para. 72 from the reasons of Rosenberg J.A. the court went on to state at para. 79 that those words are equally applicable to a minimum one-year consecutive sentence for each transaction in which a defendant uses an imitation firearm to effect an escape from lawful custody.

160 Mr. Cohen at one point in his submissions suggested that I consider the possibility that the hypothetical offender had committed 30 robberies using an imitation firearm. Mr. Coristine responded that such an offender would be considered a dangerous offender but that does not address the sentencing issue. He also submitted that in any event such an offender would be mythical, not reasonable. I agree as it would be an easy answer to any Charter challenge to a mandatory minimum to suggest that a hypothetical offender committed a very large number of offences.

161 Mr. Coristine also submitted that this argument was rejected in *Al-Isawi*, supra. at paras. 35-36, 70. Mr. Al-Isawi was convicted of 10 counts of robbery, one count of attempted robbery,

and, pursuant to s. 85(2), 11 counts of using an imitation firearm while committing, or attempting to commit, the indictable offence of robbery. Following submissions on sentencing, the Crown applied for and was granted leave to withdraw eight of the s. 85(2) counts, each of which would have attracted a mandatory minimum one-year consecutive sentence. The Crown sought a total sentence of eight years reflected as one-and-one-half years for each robbery and attempted robbery, but reduced to four years concurrent based on the totality principle; one-and-one-half years consecutive each on two of the s. 85(2) counts; and one year consecutive on the remaining count. Mr. Al-Isawi submitted that an appropriate sentence would be three years, notwithstanding the legislated mandatory minimum consecutive sentences on each of the s. 85(2) counts. He challenged the constitutionality of s. 85(4) of the Criminal Code on the same basis that the Defendants do in the application before me, although using different hypotheticals, as I will come to.

162 The trial judge rejected the *Charter* challenge, concluding that the imposition of the mandatory minimum consecutive sentences would not result in a grossly disproportionate sentence for either Mr. Al-Isawi or for a reasonably foreseeable offender. He sentenced the appellant to concurrent four-year terms on the robbery and attempted robbery counts and imposed consecutive one-year sentences for each of the three firearms counts. The total sentence was seven years.

163 The trial judge considered two hypotheticals. First, Mr. Al-Isawi argued the court was required to ask whether any number of offences, for example 20 offences, was too many to continue adding on years of incarceration. Mr. Al-Isawi argued that as the number of offences increases, which is reasonably foreseeable, the mandatory minimum consecutive sentence will at some point reach a grossly disproportionate level. By way of example he argued 20 years for 20 offences may result in a punishment more serious than that for manslaughter.

164 As Justice Stromberg-Stein, speaking for the court, noted at para. 34, the trial judge rejected the first hypothetical on the basis of common sense and experience, as referred to in *Nur* at para. 62, for reasonable hypotheticals. In his view, Mr. Al-Isawi was putting forward a "mythical offender who is convicted of a mythical number of s. 85 offences". Stromberg-Stein J.A. agreed and noted at para. 68 that in all three cases where the Supreme Court of Canada had struck down a mandatory minimum sentencing provision (*Smith, Nur*, and *Lloyd)*, the basis was that the scope of the offence could catch a reasonably foreseeable "small offender" who would be low on the culpability scale and apply the minimum sentence to that "small offender" to see if it would be grossly disproportionate. An offence that casts a wide net would be more constitutionally vulnerable because it is more likely to capture someone who is minimally culpable: *Lloyd* at para. 35. This analysis of "scope" and "reach" is an exercise of statutory interpretation of the provision setting out what conduct is captured: *Nur* at paras. 60-62.

165 At para. 69 Stromberg-Stein J.A. stated that she could not agree that just because someone can commit a crime some number of times and may be punished many times for those separate criminal transactions that a long mandatory sentence that results from committing a large number of offences would therefore be grossly disproportionate. "As the number of offences increases, so too does the offender's moral culpability and the gravity of the criminal conduct giving rise to the sentence." She agreed that it was not unimaginable that someone

would commit 20 or 30 robberies, but that the trial judge's use of the label "mythical" was to describe the fact that the "repeat offender" hypothetical is not what is contemplated by the "reasonable hypothetical" analysis envisioned in *Nur*.

166 Stromberg-Stein J.A. set out the second hypothetical considered by the trial judge and the trial judge's findings at para. 35. This hypothetical described an offender with an imitation firearm who threatened a group of people at a bus stop. Counsel suggested the number of offences would equal the number of people threatened, each charged on a separate count, which could add up to a large and grossly disproportionate sentence. The judge rejected this second hypothetical. First, he applied the same reasoning as in the first hypothetical of "adding offences until too many". Secondly, he noted that the Ontario Court of Appeal had rejected a similar hypothetical on the basis that the *Kienapple* rule would apply to limit the number of offences in *Kinnear, supra* at paras. 76-77. Mr. Cohen suggested this is flawed given the reliance on *Kinnear* which was decided by applying *Kienapple* but that is not the only reason it was rejected by the court on appeal. Stromberg-Stein J.A. at para. 59 stated that this hypothetical was not only limited by the rule in *Kienapple*, but was also contrary to the ratio in *Brown, supra* that the hypothetical must be based on the same underlying offence, which in this case is robbery. She concluded that the sentencing judge properly rejected this hypothetical, and Mr. Al-Isawi did not seriously pursue it on appeal.

167 Finally, Stromberg-Stein J.A. at para. 72 agreed with the comments of Blair J.A. in *Meszaros*:

> [79] ... In my view, a mandatory minimum one-year sentence for an offence involving the use of a firearm cannot be said to be "grossly disproportionate" to whatever might otherwise have been an appropriate punishment for such an offender having regard to the general principles of sentencing. Indeed, in spite of Mr. Breen's disavowal of the requirement in these circumstances, I cannot conceive of a reasonable hypothetical involving the use of a firearm where a mandatory one-year sentence of imprisonment would be grossly disproportionate to what would otherwise be appropriate in the circumstances. Such a punishment might well be excessive, or perhaps even manifestly unfit, but it would not be grossly disproportionate. [Emphasis added]

Stromberg-Stein J.A. stated that she too could not conceive of a reasonable hypothetical (or as the majority in *Nur* describes, a reasonably foreseeable application) involving the use of a firearm, real or imitation, in the commission of robbery where a mandatory minimum consecutive one-year sentence would be grossly disproportionate.

168 Stromberg-Stein J.A. also made it clear that her conclusion that s. 85(4) did not violate s. 12 of the Charter when the underlying offence is robbery did not depend on the fact that the Crown had withdrawn eight of the s. 85(2) counts. She referred to *Nur* at paras. 86 and 88 where the majority noted that Lamer J. (as he then was) rejected this argument in *Smith* at 1078, holding that the court cannot delegate the avoidance of a violation of the Charter to the prosecution.

169 I agree with the conclusions reached by the court on appeal in *Al-Isawi*.

Conclusion on the Defence Charter Application

170 For these reasons, the Defence *Charter* application is dismissed.

Determination of a Fit Sentence

171 Having dismissed the Defendants' *Charter* application, I turn to my determination of what is a fit sentence in this case for the crimes committed by the Defendants. Although the sentencing cases I have referred to are of assistance, particularly those from our Court of Appeal, in providing some guidance as to an appropriate sentence, the sentence in this case to be imposed on the Defendants must be considered on the specific facts of this case.

Aggravating Circumstances

172 In terms of the aggravating circumstances of these offences, any robbery is a serious offence, which is why Parliament has chosen to provide a maximum sentence of life imprisonment. Given my finding that an early morning robbery of a male who is alone in an ATM vestibule is akin to the robbery of a lone clerk late at night in a convenience store or gas bar, the cases I have referred to all call for a focus on the protection of the public and the need for general deterrence. Complainants of ATM robberies are extremely vulnerable especially late at night. Their attention is on the machine, and the machine is often in a vestibule that may be hidden from public view. As we have seen in this case, they are easy targets for robbery. As Justice Burrows of the Alberta Court of Queen's Bench in *R. v. Brako*, *2019 ABQB 214* stated at paragraph 20:

> In my view, a robbery committed at an ATM where people routinely go to withdraw cash from their bank accounts, where their attention is fixed on the machine, where very often the machine is positioned in a vestibule at least partly hidden from public view, and where, in summary, people are vulnerable targets for robbery, is more serious than a robbery committed on a random person walking on a street.

173 I agree with the Crown that a message must be sent to those who similarly prey on vulnerable people that there are harsh consequences for engaging in this type of behaviour. Clerks who are alone in convenience stores and gas bars late at night are vulnerable in the same way. As always, sentencing is an individualized exercise and no two cases are alike. But what these cases do show is that robberies with weapons that target highly vulnerable Complainants late at night attract stiff sentences. The sentence I impose must adequately reflect Messrs. Farah and Ulusow's moral blameworthiness as well as serving the paramount considerations of denunciation and deterrence. As the Crown submits, a message must be sent to those who similarly prey on vulnerable people that there are harsh consequences for engaging in this type of violent and abhorrent behaviour. That said, the cases are also clear that I must not lose sight of the potential for rehabilitation, which is strong in this case, particularly for Mr. Ulusow.

174 Also aggravating in this case is that there were multiple offences and they were all planned and deliberate. Given what they did for the last robbery, I can presume that the Defendants laid

in wait on each occasion, watching from the cover of darkness, for a victim to prey on. They did so on six or seven separate occasions. The robberies were not opportunistic. The Defendants had ample time to think about what they were about to do as they waited for their victim and then to reassess what they were doing before deciding to commit further robberies -- there was at least two days between the robberies. There is every reason to think that had they not been caught, they would have continued on this path. These were organized robberies carried out by persons acting in concert with one another.

175 The Defendants used masks to disguise their faces and sometimes gloves, presumably to avoid leaving fingerprints and they wore what they hoped would help hide their identity, with hoodies drawn up tight and loose, mostly non-descript clothing. They chose to arm themselves with imitation firearms and other sharp-edged weapons, brandish and threaten the Complainants with those weapons and use violence in the form of their threats and physical violence in the form of pushing and shoving and sometimes punching to obtain compliance. No doubt this was a terrifying and traumatic incident for each victim. We need only consider what Mr. Ulusow's mother has experienced and to consider common sense to appreciate this. Physical violence was used in almost all of the seven robberies. Mr. Yang also suffered additional physical injuries that were both costly and painful.

176 Furthermore, the Defendants were motivated by greed, not for example an addiction to drugs. They lived at home with their families and although they were not rich by any means they were well fed and clothed. Clearly they were just looking to make some quick cash and gave no thought to the consequences or how their conduct would impact those who they terrorized.

177 Some of the Complainants were shift workers who didn't have a choice but to use the bank late in the evening. The Defendants chose to prey on those who were alone and vulnerable under the cover of darkness, in an empty ATM vestibule, with access to their life savings and to steal what they had in their possession that had value. All but one of the Complainants did not know whether the gun being pointed at them was real or not. The terror of having what one believes to be a real gun pointed at you is unimaginable.

178 I found that Mr. Ulusow was the ringleader of these robberies and he was often the one who meted out the violence against the Complainants. He directed Mr. Farah as to what to do and was always in charge of the ATM during the robbery. Mr. Farah however has been convicted of one more robbery and so I agree with the Crown that the global sentence that I should impose on each of them should be the same. The Defendants did not suggest otherwise.

Mitigating Factors

179 Both Messrs. Farah and Ulusow were first time offenders at the time of these offences. Mr. Ulusow was convicted for one breach of recognizance, which he pleaded guilty to.

180 The Defendants are young. Mr. Farah had just turned 20 years old and Mr. Ulusow had just turned 22 years old at the time of these offences.

181 Mr. Farah cannot be penalized for insisting on his right to a trial, but he does not get the

benefit of a reduced sentence because of a guilty plea. In addition, there is no evidence that Mr. Farah has accepted responsibility for his actions, although I appreciate he may want to preserve a right of appeal, particularly given the collateral immigration consequences this sentence will cause. These are all neutral factors.

182 Mr. Ulusow, however, did admit his guilt with respect to the attempted robbery of Mr. Hamilton. In his letter to me and his statement to me during the sentencing hearing he has admitted that he was in fact guilty of all the offences that I have convicted him of and expressed his remorse. This was an extraordinary development and is a very strong and positive sign that he is well on the road to rehabilitation. Mr. Ulusow has clearly matured significantly through course of this proceeding which bodes well for his future.

183 Both Defendants have had difficult childhoods, particularly Mr. Farah. He was only eight years old when he fled civil war in Somalia with his mother and his brother, Cimran, eventually seeking asylum in Canada. Mr. Farah and his family were found to be Convention refugees in Canada and obtained permanent resident status. I presume he left his father behind in Somalia. Although this occurred after these offences, his only sibling, Cimran, was murdered in December of 2018. If Mr. Farah is deported to Somalia after serving his sentence, he would be forced to live in a country that has been riddled by civil war, extrajudicial killings, clan warfare and severe human right abuses. He would also leave his mother behind here without any family in Canada. I hope he will be able to avoid this tragic consequence and if he does, I have no doubt that with the support of his mother and the strong community support that he enjoys, Mr. Farah will be able to turn the corner and lead a law abiding and productive life.

184 Mr. Ulusow also had very few advantages growing up in what I accept is a frightening area. However, he clearly has a very supportive close-knit family and his siblings have demonstrated that they can rise above their circumstances. His sister Nasra did by graduating from York, and his sister Najma by attending medical school - clearly, they are doing well. His family knows about these convictions. Given that Mr. Ulusow has accepted his responsibility for these offences and given what he was able to accomplish before he committed these offences, with his determination and the support of his family I am confident that he will complete his post-secondary education, ideally through programs in the penitentiary, and that once he is released he can become a productive member of society.

What is an appropriate sentence in all of the circumstances?

185 Given my dismissal of the Defendants' Charter application I must start with the fact that in light of s. 85 of the *Criminal Code*, a minimum sentence of seven years should be imposed on Mr. Farah and a minimum six-year sentence should be imposed on Mr. Ulusow for the use of an imitation firearm. To this the Crown submits I should add four years for the robbery convictions to run concurrently to one another, 18 months for having their faces masked, concurrent to the robbery convictions and one year for the conspiracy count. This would bring the total sentence to Mr. Farah to 11 years and Mr. Ulusow to 10 years, which considering the principle of totality would be reduced to eight years.

186 The Crown submits that an eight-year sentence for each of the offenders is appropriate in

this case. This of course is at odds with the Defence position but the question still before me is whether or not I should impose a sentence at the minimum sentence required, based on the totality principle, less a credit for pre-sentence custody or impose the sentence sought by the Crown.

187 I am guided most by the Court of Appeal's decision in *Clarke* which I have already reviewed. In that case the court described the two-year less-a-day sentence imposed pursuant to a joint submission at trial for a single offence of robbery while masked and using an imitation firearm as "relatively lenient" and "plainly at the low end of the range" in light of the gravity of the offence. The court went on to state that it is "well-established" that the offence at issue "required custodial time in addition to the one year minimum for the firearms offence".

188 In my view, subject to the principle of totality, a fit sentence for Mr. Farah would be the minimum seven years for the use of an imitation firearm, three years for the robbery convictions to run concurrently to one another but consecutive to the use of an imitation firearm sentence, one year for being masked, to run concurrent to the robbery convictions and one year concurrent to the robbery convictions for the conspiracy count.

189 With respect to Mr. Ulusow, in my view a fit sentence would be the minimum six years for the use of an imitation firearm, four years for the robbery convictions to run concurrently to one another but consecutive to the use of an imitation firearm sentence, one year for being masked, to run concurrent to the robbery convictions and one year concurrent to the robbery convictions for the conspiracy count. This allocation makes sense given Mr. Ulusow's greater role in the robberies as ring leader and the one who typically meted out the violence.

190 This would bring the total sentence for each of the Defendants to 11 years which considering the principle of totality in my view should be reduced to seven years, less pre-sentence custody credit. The position the Crown is taking in this case in seeking an eight-year sentence is certainly reasonable, applying the principle of totality, particularly given the number of robberies involved. The aggravating factors of these offences are numerous and significant. However, rehabilitation is important and in my view sentencing both Defendants to the minimum sentence of seven years that is required in Mr. Farah's case is a significant penitentiary sentence. It sends a strong message of general and specific deterrence and yet also recognizes the fact they had no criminal record when these offences were committed, they are young and they have strong potential for rehabilitation given the family and community support they enjoy.

191 Accordingly, I have decided that the total sentence to be imposed on each of the Defendants will be seven years, less pre-sentence custody for time served, after taking the principle of totality into account. Given that the total sentence for each Defendant should be seven years, but given Mr. Farah's mandatory minimum sentence pursuant to s. 85 is seven years and Mr. Ulusow's is six years, the allocation will need to be somewhat different as between the two of them.

192 As I understand it, for this sentence to be legal the sentence on the robbery convictions, being masked and the conspiracy conviction would have to be reduced to time served plus one day in the case of Mr. Farah and the same for Mr. Ulusow, save that he would be sentenced to

one year consecutive on the robbery convictions so that his sentence also totals seven years. I ask counsel to advise if that this is not correct.

Disposition

193 Mr. Farah, for the reasons I have given, I sentence you as follows:

(a) for your six convictions of robbery and one conviction of attempted robbery, contrary to s. 344(1)(b) of the *Criminal Code*, I sentence you to time served plus one day on Count 2 and time served plus one day each on Counts 7, 10, 13, 16, 19, and 22, each to run concurrently to your sentence on Count 2;

(b) for your seven convictions of robbery while using an imitation firearm, contrary to s. 85(3)(a) of the *Criminal Code* (Counts 4, 9, 12, 15, 18, 21 and 24), I sentence you to one year on each Count, each consecutive to the other, for a total of seven years, to run consecutively from your sentence on Count 2;

(c) for your seven convictions of robbery while having your face masked, contrary to s. 351(2) of the *Criminal Code*, I sentence you to time served plus one day each on Counts 3, 8, 11, 14, 17, 20, and 23, each to run concurrently to each other and concurrent to your sentence on Count 2;

(d) for your conviction on Count 25 of carrying a concealed weapon, a meat cleaver, contrary to s. 88(2)(a) of the *Criminal Code*, I sentence you to time served plus one day to run concurrently to your sentence on Count 2;

(e) for your conviction on Count 1 of conspiring with Mr. Ulusow to commit robbery, contrary to s. 465(1) (c) of the *Criminal Code*, I sentence you to time served plus one day to run concurrently to your sentence on Count 2;

(f) Your global sentence of seven years and one day will be reduced by a pre-sentence credit of two months and 12 days.

194 Mr. Ulusow, for the reasons I have given, I sentence you as follows:

(g) for your five convictions of robbery and one conviction of attempted robbery, contrary to s. 344(1)(b) of the *Criminal Code*, I sentence you to time served plus

(h) one year on Count 2 and time served plus one year each on Counts 7, 10, 16, 19, and 22, each to run concurrently to your sentence on Count 2;

(i) for your six convictions of robbery while using an imitation firearm, contrary to s. 85(3)(a) of the *Criminal Code* (Counts 4, 9, 12, 18, 21 and 24), I sentence you to

(j) one year on each Count, each consecutive to the other, for a total of six years, to run consecutively from your sentence on Count 2;

(k) for your six counts of robbery while having your face masked, contrary to s. 351(2) of the *Criminal Code*, I sentence you to time served plus one day each on Counts 3, 8, 11,17, 20, and 23, each to run concurrently to your sentence on Count 2;

(l) for your conviction on Count 1 of conspiring with Mr. Farah to commit robbery, contrary to s. 465(1)(c) of the *Criminal Code*, I sentence you to time served plus one day to run concurrently to your sentence on Count 2.

195 Your global sentence of seven years and one day will be reduced by a pre-sentence credit of 11 months and three days.

196 Mr. Farah, I also make a DNA order in Form 5.03 authorizing the taking of a DNA sample on the primary ground pursuant to s. 487.051(1) of the *Criminal Code* with respect to your robbery convictions, Counts 2, 7, 10, 13, 16, 19, and 22, as robbery is a primary designated offence. This order shall be executed when you attend at the Court House at 361 University Avenue, Toronto, at the time specified that I will come to.

197 Similarly, Mr. Ulusow, I also make a DNA order in Form 5.03 authorizing the taking of a DNA sample on the primary ground pursuant to s. 487.051(1) of the *Criminal Code* with respect to your robbery convictions, Counts 2, 7, 10, 16, 19, and 22, as robbery is a primary designated offence. This order shall be executed when you attend at the Court House at 361 University Avenue, Toronto, at the time specified that I will come to.

198 In addition, for each of you I order there will be a mandatory weapons prohibition order pursuant to s. 109(1) of the *Criminal Code* for 10 years.

199 Finally, as you are both not currently in custody and this sentencing decision is being provided to you by video conference, I order that you both turn yourself in to the Officer in Charge of the cells at the Court House at 361 University Ave. Toronto, on Monday, October 5, 2020 at 11:00 a.m. so that the DNA order I have made can be executed and that you both be taken into custody. I will issue a Warrant for your Committal with discretion, to ensure that you both comply with this order.

N.J. SPIES J.
