COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Burke-Whittaker, 2025 ONCA 142
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2025 ONCA 142 (CanLII)

Hourigan, Favreau and Dawe JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Terrell Burke-Whittaker

Respondent

Owen Goddard, for the appellant

Kim Schofield and Ricardo Golec, for the respondent

Heard: January 20, 2025

On appeal from the sentence imposed on May 13, 2024 by Justice Robert F. Goldstein of the Superior Court of Justice, reported at 2024 ONSC 2906.

Favreau J.A.:

A. OVERVIEW

[1] Terrell Burke-Whittaker pled guilty to one count of possession of a loaded or prohibited or restricted firearm contrary to s. 95(1) of the Criminal Code, R.S.C. 1985, c. C-46. The sentencing judge sentenced Mr. Burke-Whittaker to a conditional sentence of two years less a day to be followed by three years'

probation. The sentencing judge recognized that this was a serious offence that would normally carry a penitentiary sentence in the two-to-five-year range. He further recognized that denunciation and deterrence are the primary sentencing objectives for an offence of this nature. However, he found that Mr. Burke-Whittaker's extensive rehabilitative efforts since the time of the offence gave rise to exceptional circumstances warranting a non-custodial sentence.

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[2] The Crown appeals the sentence, arguing that the sentencing judge erred in principle by undervaluing the importance of denunciation and deterrence for an offence of this nature while overvaluing rehabilitation. The Crown further argues that the sentence is unfit given the seriousness of the offence and the lack of proportionality with sentences imposed for similar offences by offenders in similar circumstances.

[3] I agree with the Crown. The sentencing judge erred in principle in finding exceptional circumstances in this case and the sentence imposed was demonstrably unfit. I would impose a three-year penitentiary sentence for this offence.

[4] However, given that Mr. Burke-Whittaker has already served a significant portion of his conditional sentence and given his ongoing commendable rehabilitative efforts, no good would come from incarcerating him now. In these unique circumstances, I would dismiss the appeal and allow Mr. Burke-Whittaker

to continue serving the balance of his conditional sentence followed by three years of probation.

B. CIRCUMSTANCES OF THE OFFENCE

[5] On June 9, 2020, the appellant attended a viewing for Dimarjio Jenkins, who was a rapper known as Houdini. Mr. Jenkins had been shot and killed on a street in downtown Toronto on May 26, 2020. The viewing took place at a restaurant in North York. The parking lot behind the building in which the restaurant was located backed onto Highway 401.

[6] Late on the evening of the viewing, a vehicle driving on Highway 401 pulled onto the shoulder of the westbound lanes behind the restaurant. At that point, a crowd was gathered in the parking lot. Someone in the car started firing shots into the crowd. Many people in the parking lot ran into the building through a door that gave out onto the parking lot. Some stayed in the parking lot and shot back toward the vehicle, in the direction of passing traffic on Highway 401. Others hid behind a dumpster that was close to the door of the building.

[7] Mr. Burke-Whittaker was in the parking lot when the shooting started. At that point, he took cover behind the dumpster. He was carrying a satchel from which he took out a firearm. While others around him were shooting and running into the building, it took Mr. Burke-Whittaker a few moments to cock his firearm. Once he

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did, he came out from behind the dumpster, fired a shot toward the vehicle, in the general direction of Highway 401, and fled through the door into the building.

[8] The whole incident was relatively brief and captured on video. Fortunately, no one was killed or injured.

[9] The police investigation identified Mr. Burke-Whittaker as one of the shooters. He turned himself in on June 22, 2021, just over one year after the shooting. His firearm was never recovered.

[10] On the eve of trial, Mr. Burke-Whittaker pled guilty to one count of possession of a loaded or prohibited or restricted firearm contrary to s. 95(1) of the *Criminal Code*.

C. MR. BURKE-WHITTAKER'S CIRCUMSTANCES

[11] Mr. Burke-Whittaker is a young Black man. At the time of the offence, he was 24 years old. He is currently 28 years old. He was brought up by his mother and grandmother in Brampton. While he was growing up, he had very little contact with his father who was in and out of jail. His father died of cancer in 2023.

[12] Mr. Burke-Whittaker completed high school. He started a college degree, which he did not complete.

[13] There is little information in the record regarding his employment history up to the time he turned himself in. During the summer of 2022, after he was released on bail, he worked for a landscaping business owned by the father of one of his

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friends. He also started a vending machine business. At the time of sentencing, he had been working full-time as an extruder operator since August 2023. While Mr. Burke-Whittaker was out on bail, besides his paid employment, he performed 110 hours of volunteer work in a long-term care home.

[14] In September 2023, Mr. Burke-Whittaker was accepted to the Ontario Fire Academy in a full-time program, and at the sentencing hearing he indicated that he intended to train as a firefighter.

[15] Mr. Burke-Whittaker is in a long-term relationship with his girlfriend. They have a daughter who was around five years old at the time of sentencing. Mr. Burke-Whittaker has a very good relationship with his daughter, and he provides financial support to his girlfriend and daughter.

[16] At the time of the offence, Mr. Burke-Whittaker did not have a criminal record.

[17] Mr. Burke-Whittaker did not file a *Morris* report or a pre-sentence report. However, he provided the court with several letters of support, including from his girlfriend, an aunt, a family friend who arranged the volunteer work at the long-term care home, and his friend's father for whom he did the landscaping work.

[18] At the sentencing hearing, Mr. Burke-Whittaker read a letter that he wrote in which he expressed remorse, stating that he had "come to deeply regret the actions that led [him] to the involvement of this incident", and that "[t]he

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consequences of [his] actions [] weigh heavily on [his] conscious [*sic*] and [he is] committed to making amends, however that is possible."

D. SENTENCING DECISION

[19] In his reasons, the sentencing judge started with a review of the circumstances of the offence and Mr. Burke-Whittaker's circumstances. When reviewing Mr. Burke-Whittaker's circumstances, the sentencing judge noted that there was no *Morris* report, but that the circumstances under which he grew up and systemic racism were nevertheless relevant:

> Mr. Burke-Whittaker, in his letter to me, did not suggest that there was a connection between systemic racism and the obstacles that he has had to overcome. I may be speculating, but I think that Mr. Burke-Whittaker was making an effort in his letter to the court to take personal responsibility and not to blame anyone but himself. He may not blame what have come to be called the "*Morris*" factors, and I think it is to his credit that he does not do so, but it is still my responsibility to at least evaluate whether they have played a role and determine the impact. In this case, based on the information that I have received, I think it is fair to say that these factors have played a role in Mr. Burke-Whittaker's upbringing, that there have been difficulties and obstacles – and, perhaps most damaging, a difficult environment. I do not see, however, how the Morris factors played a direct role in the offence. I do take them into account, along with all of the letters of support and other information I have about Mr. Burke-Whittaker, in terms of his prospects for rehabilitation. [Emphasis added.]

[20] The sentencing judge then emphasized that Mr. Burke-Whittaker had strong prospects for rehabilitation, stating that there was no evidence he failed to comply

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with his bail conditions, and that he had "used his time on bail wisely, to start a small business, to work, and to apply to become a firefighter."

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[21] The sentencing judge next reviewed the positions of the parties. The Crown sought a sentence of four years, relying on a number of decisions from this court. Mr. Burke-Whittaker submitted that a conditional sentence of two years less a day would be appropriate. In making this submission, he relied on several decisions of the Superior Court where the court imposed a conditional sentence for offences under s. 95(1) of the *Criminal Code*.

[22] After reviewing the relevant case law, the sentencing judge stated that the range for possession of a loaded prohibited handgun is "from low penitentiary to 5 years, depending on the circumstances", and that cases "where a conditional sentence has been imposed usually involve some kind of exceptional circumstance".

[23] The sentencing judge acknowledged that none of the cases that the defence relied on where a conditional sentence was imposed included the discharge of the firearm as an aggravating factor. He further found that the discharge of the firearm in this case was "particularly aggravating", describing the circumstances under which it occurred as follows:

> The nature of the offence is aggravating. Mr. Burke-Whittaker brought a gun to a funeral viewing. He had it in public. I draw the inference that he was expecting some

> kind of trouble and that he was prepared to deal with that trouble using a firearm.
>
> It is particularly aggravating that he discharged that firearm. The context is important. When the shooting started, many people took cover behind a dumpster, pulled out a firearm, and shot back. Mr. Burke-Whittaker pulled out his firearm. He struggled with cocking it, however. I infer that he would have participated in the firefight if he had been able to properly cock the weapon and chamber a round. When he was finally able to do so, the shooting was over and most of the people behind the dumpster had fled into the adjacent building. He fired towards the highway, and then fled into the building as well.
>
> Mr. Burke-Whittaker's actions in firing that weapon are highly aggravating. It was not fired in self-defence. He was perfectly safe with the dumpster between him and whoever was shooting from the shoulder of Highway 401. The shooting had apparently finished by the time he fired the round, although I accept it was a dynamic situation and he may not have been aware of that. Most importantly, Mr. Burke-Whittaker fired a round in the direction of a busy highway with traffic roaring by. That round could have easily hit a passing vehicle and killed or injured people. It is simply a matter of moral luck that it did not do so. [Emphasis added.]

[24] The sentencing judge next reviewed the principles of sentencing that apply to firearms offences, acknowledging that for such offences "the principles of general deterrence and denunciation play the most important role". He further acknowledged that, while rehabilitation plays a role in sentencing for firearms possession offences, "that role must be secondary to the principles of denunciation and deterrence". He pointed to the devastating impact of gun crime in the City of

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Toronto, and that it was only a matter of luck that Mr. Burke-Whittaker did not kill an innocent bystander.

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[25] Having reviewed all the evidence and applicable legal principles, the sentencing judge held that there were “exceptional circumstances here that justify a sentence below the penitentiary range.” He further stated that he had “wrestled with this case” and believed that, ultimately, “there is no social utility in this particular case in sending Mr. Burke-Whittaker to the penitentiary”. He then imposed a conditional sentence of two years less a day, followed by three years of probation. He added a requirement that Mr. Burke-Whittaker attend before him from time to time. He concluded by stating that:

> Every now and then, people come before the court who deserve a break, something that is out of the ordinary – and in this case I am going to give such a break to Mr. Burke-Whittaker, but, as I say, I am not going to make it easy for him.

E. ANALYSIS

[26] The only issue on appeal is whether the sentencing judge erred in imposing a conditional sentence of two years less a day.

[27] The Crown submits that the sentencing judge made an error in principle by undervaluing denunciation and deterrence and overvaluing rehabilitation, and that the sentence is also demonstrably unfit for an offence of this nature.

[28] Mr. Burke-Whittaker submits that sentencing is highly discretionary and that it was appropriate for the sentencing judge to find exceptional circumstances in this case, and to impose a conditional sentence.

(1) The standard of review

[29] The Crown is entitled to appeal a sentence with leave of the court: *Criminal Code,* s. 676(1).

[30] This court owes significant deference to a sentencing judge's decision. The court will only intervene where (1) the sentence imposed is demonstrably unfit, or (2) where the sentencing judge committed an error in principle, failed to consider a relevant factor or erroneously considered an aggravating or mitigating factor, and it appears from the decision that such an error had an impact on the sentence: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 44, 51; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at paras. 26-28.

[31] On appeal, the court is not to interfere with a sentencing decision because the appellate court would have imposed a different sentence or weighed relevant factors differently: *R. v. W.V.*, 2023 ONCA 655, 169 O.R. (3d) 68, at para. 26.

[32] In determining whether a sentence is demonstrably unfit, the inquiry is focused on the principle of proportionality set out in s. 718.1 of the *Criminal Code*. As stated in *Lacasse*, at para. 53:

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> This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(*a*) and (*b*) of the *Criminal Code*.

[33] In *Lacasse*, at para. 51, the Supreme Court also emphasized that sentencing judges have discretion to identify an appropriate sentencing range and that the identification of an inappropriate sentencing range on its own is not an error in principle. The court also observed that "sentencing ranges are primarily guidelines, and not hard and fast rules", and therefore "a deviation from a sentencing range is not synonymous with an error of law or an error in principle": *Lacasse*, at para. 60, citing *R. v. Nasogaluak*, 2010 SCC 6, [2010] S.C.R. 206, at para. 44 and *R. v. M. (T. E.)*, [1997] 1 S.C.R. 948, at para. 32. However, if the sentence imposed "departs significantly and for no reason from the contemplated sentences", this may be an indication that a sentence is demonstrably unfit: *Lacasse*, at para. 67.

[34] In *R. v. Parranto*, 2021 SCC 46, 436 D.L.R. (4th) 389, at para. 40, the Supreme Court further explained the role a sentencing range may play in

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determining the fitness of a sentence. In this context, the court explained that "exceptional" circumstances are not required to justify a sentence that falls outside a sentencing range:

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> Since starting points and ranges reflect the gravity of the offence, however, the sentencing judge's reasons and the record must allow the reviewing court to understand why the sentence is proportionate despite a significant departure from the range or starting point. This applies regardless of whether the reasons refer to the starting point or not. <u>At the very least, the appellate court must be able to discern from the reasons and the record why the sentence is fit in the circumstances of the offence and the offender</u>. We emphasize, however, that it is inappropriate for appellate courts to "artificially constrain sentencing judges' ability to impose a proportionate sentence" by requiring "exceptional circumstances" when departing from a range. Departing from a range or starting point is appropriate where required to achieve proportionality. [Citations omitted; emphasis added.]

(2) The sentencing judge made an error in principle

[35] The Supreme Court and this court have repeatedly emphasized the seriousness of offences involving the possession of concealed firearms in public places. For example, in *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641, at para. 68, the court stated:

> Gun crimes involving the possession of loaded, concealed firearms in public places pose a real and immediate danger to the public, especially anyone who interacts with the gun holder … A person who carries a concealed, loaded handgun in public undermines the community's sense of safety and security. Carrying a concealed, loaded handgun in a public place in Canada

> is antithetical to the Canadian concept of a free and ordered society. [Citations omitted.]

[36] See also *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 1, 82; *R. v. Husbands*, 2024 ONCA 155, 170 O.R. (3d) 486, at para. 126, leave to appeal to S.C.C. requested, 41353; *R. v. Habib*, 2024 ONCA 830, 99 C.R. (7th) 110, at para. 6; and *R. v. Ellis*, 2016 ONCA 598, 132 O.R. (3d) 510, at para. 78.

[37] This court has also repeatedly stressed that general deterrence and denunciation are the primary objectives for offences involving the possession of a concealed firearm in a public place: *R. v. Stephens*, 2024 ONCA 793, at para. 18; *R. v. Stojanovski*, 2022 ONCA 172, 160 O.R. (3d) 641, at para. 114; and *R. v. Danvers* (2005), 201 O.A.C. 138 (C.A.), at paras. 77-78. The closing words at para. 14 of *R. v. Brown*, 2010 ONCA 745, 277 O.A.C. 233, remain highly relevant today:

> Handguns are an all too prevalent menace in the Greater Toronto Area. First and foremost, the sentences imposed for firearms offences must further the sentencing goals of denunciation, deterrence and protection of the public.

[38] Given the seriousness of the offence and the need for denunciation and deterrence, this court has stated that incarceration will almost always be required: *Morris*, at para. 71. In the normal course, the sentencing range begins at the low end of the penitentiary range for first-time offenders convicted of possessing a loaded prohibited firearm in circumstances where there is no other criminal activity: *Habib*, at paras. 18, 57; *R. v. Smith*, 2023 ONCA 620, at para. 7; *R. v. Mohiadin*,

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2021 ONCA 122, at para. 13; *R. v. Smickle*, 2014 ONCA 49, 317 O.A.C. 196, at para. 19; and *R. v. Graham*, 2018 ONSC 6817, at para. 37, aff'd 2020 ONCA 692, 474 C.R.R. (2d) 137.

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[39] In this case, the sentencing judge recognized the seriousness of the offence. He also stated that the primary objective for this type of offence is denunciation and deterrence. But he quickly pivoted from this principle to a finding that Mr. Burke-Whittaker's rehabilitation efforts give rise to exceptional circumstances and that there would be no "social utility" to imposing a custodial sentence on him. It is helpful at this point to cite the sentencing judge's full reasoning:

> The Crown's submission that a sentence of four years should be imposed is well within the range of sentence for similar types of offences and similar types of offenders. On the other hand, this offence happened four years ago. Mr. Burke-Whittaker turned himself in about a year after that. He has now been on bail for just about three years. That is a lot of water under the bridge.
>
> Although my first inclination was to sentence Mr. Burke-Whittaker to a term in the penitentiary, and certainly deterrence and denunciation demand that I do so, my view is that there are some exceptional circumstances here that justify a sentence below the penitentiary range. I have wrestled with this case, and ultimately, I think that there is no social utility in this particular case in sending Mr. Burke-Whittaker to the penitentiary. I am persuaded that this is one of those exceptional cases mentioned by my colleague Code J. in Collins that justifies a departure from the normal range. In my view, Mr. Burke-Whittaker does not represent a danger to the community at this point. Accordingly, after much anxious consideration, I will sentence Mr. Burke-Whittaker to a sentence of two years less a day. After considering whether that sentence

> is in accordance with the purposes and principles of sentencing, especially the principle of rehabilitation, I am satisfied that he can be served in the community. I am not, however, going to make it easy for him because there still must be a punitive element to the sentence in order to satisfy the objectives of denunciation and deterrence. I am therefore also going to put him on probation for three years. He will thus be subject to state supervision for one day short of five years, in addition to the time he has spent on bail. As well, I am going to require that he attend before me from time to time, which I believe I have jurisdiction to do, while he is on his conditional sentence. Every now and then, people come before the court who deserve a break, something that is out of the ordinary – and in this case I am going to give such a break to Mr. Burke-Whittaker, but, as I say, I am not going to make it easy for him. [Emphasis added.]

[40] In my view, the sentencing judge made errors in principle in his rationale for imposing a conditional sentence of two years less a day.

[41] First, while the sentencing judge recognized the primary objectives of denunciation and deterrence for offences involving illegal loaded firearms, as the Crown submits, he ultimately unduly prioritized rehabilitation.

[42] Second, the sentencing judge stated that there were exceptional circumstances in this case, but failed to explain what they were other than Mr. Burke-Whittaker's rehabilitative efforts. However, cases where an unusually lenient sentence is justified based on a change in circumstances post-conviction are "the exception and not the rule": *R. v. L.S.*, 2017 ONCA 685, 354 C.C.C. (3d) 71, at paras. 111-12, citing *R. v. Ghadban*, 2015 ONCA 760, 342 O.A.C 177, at paras. 13-15, 20. Mr. Burke-Whittaker's efforts are certainly commendable, but on

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their own, they are insufficient to amount to circumstances that justify imposing a non-custodial sentence, especially where the discharge of the firearm is a serious aggravating factor: see *R. v. S.W.*, 2024 ONCA 173, 171 O.R. (3d) 269, at para. 46.

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[43] Third, the sentencing judge failed to consider Mr. Burke-Whittaker's moral blameworthiness for the offence. Moral blameworthiness can arise from the circumstances under which the offence is committed or the offender's own circumstances: *Morris*, at paras. 88, 100-101. In cases where courts have imposed a sentence below the range based on "exceptionally strong mitigating circumstances", there is "both diminished moral culpability and the complete reformation of the accused while on bail": *R. v. Collins*, 2023 ONSC 5768, 544 C.R.R. (2d) 43, at para. 90. Here, Mr. Burke-Whittaker provided no evidence or explanation for why he decided to go to the viewing with a loaded firearm. He also provided no explanation for discharging his firearm. Notably, the sentencing judge found that Mr. Burke-Whittaker did not shoot his gun in self-defence and that he would have likely "participated in the firefight" if he did not have difficulty cocking his gun. Further, there was no *Morris* report or other evidence drawing a direct link between Mr. Burke-Whittaker's circumstances and the commission of the offence. Accordingly, based on the record before the sentencing judge, this is not a case where there was significant diminished moral culpability.

[44] Fourth, by stating that there would be no social utility in imposing a custodial sentence, the sentencing judge lost sight of the need for general deterrence. When making this statement, he was focused on Mr. Burke-Whittaker and whether he poses any danger to the public. But, given that denunciation and deterrence, including general deterrence, are the primary objectives of sentencing for firearm offences, the social utility of a custodial sentence is at least in part that it is meant to deter others from committing similar offences.

[45] For these various reasons, I am satisfied that the sentencing judge made a number of errors in principle in imposing a two years' less a day conditional sentence on Mr. Burke-Whittaker.

(3) The sentence was demonstrably unfit

[46] Section 718.1 of the *Criminal Code* identifies proportionality as the "fundamental principle" of sentencing. A fit sentence is a sentence that is proportionate to the gravity of the offence and the circumstances of the offender: *R. v. Altiman*, 2019 ONCA 511, 56 C.R. (7th) 83, at para. 46, citing *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at para. 27; *Husbands*, at para. 56. Proportionality includes consideration of the range of sentences for similar offences. It also includes consideration of sentences imposed in similar circumstances on similar offenders: *Lacasse*, at para. 53.

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[47] A sentence is demonstrably unfit where "it constitutes 'an unreasonable departure' from the principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender": *R. v. Gobin*, 2023 ONCA 641, at para. 5, citing *Lacasse*, at paras. 11-12, 39-40 and 44-53; *Altiman*, at para. 44.

[48] In my view, the sentence imposed on Mr. Burke-Whittaker was demonstrably unfit. While the sentencing judge had regard to Mr. Burke-Whittaker's circumstances, he lost sight of the seriousness of the offence. This case did not only involve the possession of a concealed firearm in a crowded public place, but Mr. Burke-Whittaker discharged the firearm, which, as recognized by the sentencing judge, was a very serious aggravating factor. If Mr. Burke-Whittaker had been found guilty of discharging the firearm, he would have been subject to a mandatory minimum five-year sentence: *Criminal Code*, ss. 244(2), 244.2(3). By pleading guilty to a lesser offence, he had a chance at a lower sentence, but this did not automatically entitle him to a non-custodial sentence. The sentence still has to be proportionate to the gravity of the offence, which includes the significant aggravating factor of discharging a firearm in a public place.

[49] There are no similar cases where an offender has been sentenced to a conditional sentence of two years less a day for a s. 95(1) offence, where the discharge of the firearm in a public place was an aggravating factor.

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[50] On the contrary, three-year sentences for the possession of a firearm are common where the firearm was not discharged and there are mitigating factors: *R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, at para. 206, aff'd 2015 SCC 15, [2015] 1 S.C.R. 773.

[51] More importantly, sentences at or under the low end of the penitentiary range generally involve factors that significantly attenuate the offender's moral blameworthiness. For example, in *Collins*, a decision the sentencing judge relied on in this case, the defendant's "moral culpability [was] reduced by the extraordinary challenges he encountered when growing up." He had been diagnosed with PTSD after his mother was murdered when he was 13, and, a year later, his best friend was shot and killed. By the time he was sentenced for several possession offences, including possession of a loaded prohibited firearm, the defendant had undertaken significant rehabilitative efforts, which the sentencing judge considered in tandem with the factors attenuating his moral blameworthiness before imposing concurrent conditional sentences for the various offences.

[52] This does not mean that a conditional sentence is never appropriate for a s. 95 offence that involves the discharge of a firearm: see *Morris*, at paras. 180-81. For example, there may be compelling evidence that attenuates the gravity of the offence or the moral blameworthiness of the offender or both. But this is not such a case. It bears repeating that Mr. Burke-Whittaker brought a loaded firearm to a viewing for someone who had been shot dead. Mr. Burke-Whittaker has

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provided no explanation for attending the wake with a loaded firearm. One can only assume that given the circumstances under which Mr. Jenkins had died, Mr. Burke-Whittaker anticipated that he may need the handgun at the viewing and that he was prepared to use it. The sentencing judge found that he did not use the firearm in self-defence and that he would have shot more than once if he had no difficulty cocking his gun. These circumstances in no way lower Mr. Burke-Whittaker's moral blameworthiness.

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[53] Mr. Burke-Whittaker's guilty plea is certainly a mitigating factor, but only up to a point; it does not justify going below the bottom of the range in the absence of other exceptionally mitigating factors: *R. v. Lynch*, 2022 ONCA 109, 160 O.R. (3d) 241, at para. 22. By making such a plea, he was avoiding a mandatory minimum sentence of five years. But he also knew that the discharge of the firearm was an aggravating factor and that there was no promise of a non-custodial sentence.

[54] Having regard to the circumstances of the offence and Mr. Burke-Whittaker's circumstances, I am satisfied that the sentence imposed by the sentencing judge was manifestly unfit. It was disproportionate to sentences imposed for similar offences on offenders in similar circumstances. It also fails to achieve the primary objectives of denunciation and deterrence for such offences.

(4) A fit sentence in this case

[55] Having found that the sentence imposed by the sentencing judge was manifestly unfit, it normally falls to this court to impose a fit sentence: *Friesen*, at para. 27.

[56] In this case, in my view, a penitentiary sentence of three years would be appropriate. A three-year custodial sentence recognizes the significant aggravating circumstances of the offence in this case (which I have already reviewed), while recognizing the important mitigating factors. Specifically: Mr. Burke-Whittaker was a relatively youthful offender who pled guilty, he has shown remorse, he does not have a criminal record, he has the support of his family, he provides financial support to his girlfriend and daughter and, as emphasized by the sentencing judge, has made significant rehabilitative efforts. In addition, while Mr. Burke-Whittaker has provided no direct evidence that attenuates his moral blameworthiness, as recognized by the sentencing judge, anti-Black systemic racism has no doubt played a role in his difficult upbringing and background. As this court recognized in *Morris*, at para. 123, "courts should take judicial notice of the existence of anti-Black racism in Canada and its potential impact on individual offenders." See also *R. v. Jackson*, 2018 ONSC 2527, 46 C.R. (7th) 167, at paras. 82-86 and 111-12; *R. v. McLarty-Mathieu*, 2022 ONCJ 498, at para. 22, citing *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 83.

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[57] Accordingly, in my view, a fit sentence in this case would be a three-year penitentiary sentence.

(5) This is not an appropriate case for reincarceration

[58] Mr. Burke-Whittaker filed fresh evidence on appeal to demonstrate that his rehabilitation efforts are continuing and that he has completed his firefighting training and is now applying for employment as a firefighter. The fresh evidence also includes transcripts from appearances before the sentencing judge since the date of sentencing in which it is evident that Mr. Burke-Whittaker is taking his commitment to the sentencing judge and his rehabilitative efforts seriously. The Crown does not object to this fresh evidence as long as it is only used to consider an appropriate sentence in the event the sentence imposed by the sentencing judge is found to be unfit.

[59] On occasion, this court has declined to impose a custodial sentence or an increased sentence on appeal, despite finding that the sentence imposed at trial was unfit, based on the passage of time and changes in the offender's circumstances. I am satisfied that this is such a case for a number of reasons.

[60] First, Mr. Burke-Whittaker has already served more than 9 months of his conditional sentence. The Crown concedes that, if he is resentenced and incarcerated, he should receive one to one credit for this period of time. Mr. Burke-Whittaker also spent 29 days in pre-sentence custody, which the Crown at

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sentencing submitted should be credited as around a month and a half. In addition, while on bail, Mr. Burke-Whittaker was on house arrest for around 17 months, including full house arrest for over 9 months. If Mr. Burke-Whittaker had been given a custodial sentence after his guilty plea, he would likely have received some credit for his period of house arrest: *R. v. Downes* (2006), 79 O.R. (3d) 321, at para. 29; *R. v. Adamson*, 2018 ONCA 678, 364 C.C.C. (3d) 41, at para. 106. I am satisfied that credit in the area of 1 to 1.5 months would be appropriate. In the circumstances, if the court were to require Mr. Burke-Whittaker to be incarcerated now, he would be close to reaching his period of parole eligibility, which would occur after serving one year of a three-year sentence.

[61] Second, based on the fresh evidence filed by Mr. Burke-Whittaker, it is evident that he has continued to make tremendous rehabilitative efforts. He has continued his efforts to become a firefighter. He has completed all necessary courses and certifications, and has applied for several jobs. He has also formed a strong relationship with a mentor who is a firefighter and who is helping guide his efforts to secure work as a firefighter. In addition, he benefits from the ongoing supervision of the sentencing judge. Incarcerating Mr. Burke-Whittaker now for a relatively brief period would interrupt this progress and would also mean that he would no longer benefit from the ongoing supervision of the sentencing judge and the three years of probation imposed by the sentencing judge.

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[62] In some cases where this court allows a sentence appeal and imposes a higher sentence, the court nevertheless stays the balance of the sentence to avoid reincarceration: see *R. v. T.J.*, 2021 ONCA 392, 156 O.R. (3d) 161; *R. v. E.C.*, 2019 ONCA 688; *R. v. Davatgar-Jafarpour*, 2019 ONCA 353, 146 O.R. (3d) 206; and *Morris*, at para. 184. Generally, this involves circumstances where the offender has already served all or most of the sentence imposed by the lower court, and this court determines that reincarceration is not necessary or appropriate. In other cases, such as this one, where imposing a higher sentence and staying it would have the effect of ending an ongoing conditional sentence and subsequent probation, the court denounces the sentence imposed below as unfit but nevertheless dismisses the appeal: see *R. v. Pike*, 2024 ONCA 608, 171 O.R. (3d) 241; *R. v. C.P.*, 2024 ONCA 783; *R. v. R.S.*, 2023 ONCA 608, 168 O.R. (3d) 641; and *R. v. M.M.*, 2022 ONCA 441. The purpose of proceeding in this fashion is to maintain the benefit of court supervision.

[63] It is evident that this is not an appropriate case for a stay. Instead, I would dismiss the appeal to allow Mr. Burke-Whittaker to complete his conditional sentence and have the benefit of the three years of probation. This will also ensure that he continues to have the benefit of the sentencing judge's supervision.

[64] I make one final comment. This was not an easy decision. Hindsight tells us that the sentencing judge was right to have faith in Mr. Burke-Whittaker's rehabilitative efforts. That faith has paid off. Mr. Burke-Whittaker is obviously taking

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the chance the sentencing judge gave him very seriously. The sentencing judge for his part has put a lot of effort into holding Mr. Burke-Whittaker accountable. In such circumstances the obvious question is: why not simply find the sentencing judge committed no error in deciding that there were exceptional circumstances and that the sentence imposed was fit? The answer is because denunciation and deterrence are aimed in part at discouraging others from committing similar offences. While I would spare Mr. Burke-Whittaker from incarceration and a penitentiary sentence at this point in the process, the sentence was nevertheless demonstrably unfit at the time it was imposed. This court has repeatedly condemned gun violence and must continue to do so. The circumstances of the offence and Mr. Burke-Whittaker's circumstances did not justify a non-custodial sentence of less than two years in this case. While the outcome is the same for Mr. Burke-Whittaker as if the sentence was found to be fit, this court must remain unequivocal in sending the message that an offence of this nature, which included the discharge of a firearm in a public place, requires a significant period of incarceration, unless there are truly unusual circumstances.

F. DISPOSITION

[65] I would grant the Crown leave to appeal the sentence but dismiss the appeal.

"L. Favreau J.A."

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Dawe J.A. (concurring):

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[66] I agree with my colleague Favreau J.A.'s conclusion that the Crown's sentence appeal should be dismissed. However, I arrive at this result by a different reasoning path.

[67] My colleagues would both find that the sentencing judge erred in principle by imposing a conditional sentence and probation on the respondent rather than a penitentiary-length term of imprisonment, and would also find that the sentence imposed was demonstrably unfit, although Favreau J.A. would nevertheless decline to interfere with it on appeal. I disagree. In my view, the sentencing judge was entitled to exercise his broad sentencing discretion in the manner that he did, and his sentencing decision is entitled to appellate deference.

[68] I agree with my colleagues that the respondent's sentence is well below the ordinary range for the offence of possessing a loaded prohibited or restricted firearm, particularly once the significant aggravating circumstance of his actually having fired his handgun is taken into account. This was unquestionably a very lenient sentence. However, its leniency does not automatically mean that it is demonstrably unfit, or that the sentencing judge must have made an error in principle by imposing it. Sentencing ranges are not straightjackets, and sentencing judges may depart from them when they consider it necessary to do so to craft a fit sentence for a particular offender and offence: see *R. v. Lacasse,* 2015 SCC 64,

[2015] 3 S.C.R. 1089, at para. 57. Their discretionary judgment calls are entitled to substantial appellate deference, and appellate interference is only warranted if the sentencing judge either errs in principle or imposes a sentence that is demonstrably unfit: see e.g., *R. v. M. (C.A.),* [1996] 1 S.C.R. 500, at para. 90; *Lacasse,* at para. 41, citing *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-124.

[69] For the following reasons, I am not persuaded that we can properly interfere with the sentence imposed on the respondent, and would accordingly dismiss the Crown's appeal.

A. ANALYSIS

[70] My colleagues both conclude that the sentencing judge's decision to impose a conditional sentence on the respondent was tainted by errors in principle, and would also find that the sentence itself was demonstrably unfit. As I will explain, I disagree on both points.

(1) The sentencing judge did not commit errors in principle

[71] It is well-established that the "errors in principle" that can justify appellate intervention on a sentence appeal include "failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, [and] overemphasizing relevant factors": *R. v. Rezaie* (1996)*,* 31

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O.R. (3d) 713 (C.A.), at p. 719. However, "this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently": *R. v. Nasogaluak,* 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 46. As Laskin J.A. explained in *R. v. McKnight* (1999), 44 O.R. (3d) 263 (C.A.), at p. 273, in a passage adopted by LeBel J. in *Nasogaluak,* at para. 46:

> To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. <u>Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle</u>. [Emphasis added; footnotes omitted.]

[72] Sentencing is a discretionary process because it requires sentencing judges to balance many different factors and competing objectives against one another. Different judges can reasonably come to different conclusions about what would be a fit sentence in a particular set of circumstances. The rule of appellate deference frequently demands that appellate courts uphold sentences that are either higher or lower than what they would have imposed themselves. Appellate courts cannot reason backwards and conclude that since they would have imposed

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a different sentence, the sentencing judge must not have properly weighed all of the relevant factors.

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[73] My colleague Favreau J.A. finds that the sentencing judge made four errors in principle. Specifically, she concludes that he:

> (i) "unduly" emphasized the respondent's rehabilitation, despite properly recognizing that the primary sentencing objectives for firearms offences are denunciation and deterrence;
>
> (ii) failed to adequately explain what exceptional circumstances justified such a lenient sentence, other than the respondent's pre-sentencing rehabilitative efforts;
>
> (iii) failed to consider the respondent's moral blameworthiness for the offence; and
>
> (iv) "lost sight of the need for general deterrence" by stating that there would be no social utility in imposing a custodial sentence on the respondent.

In his dissenting reasons, my colleague Hourigan J.A. emphasizes the third and fourth of these alleged errors in principle.

[74] In my opinion, when my colleagues' objections to the sentencing judge's reasoning are viewed through the lens of the reasonableness standard of review, none can properly be labeled "errors in principle". Rather, they all reflect my colleagues' conclusions that they would have weighed the relevant sentencing factors and objectives differently, and would thus have reached a different result.

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[75] The sentencing judge expressly stated that "[i]n firearms cases, the principles of general deterrence and denunciation play the most important role", and that "the most important sentencing principle in firearms cases is general deterrence – and those who carry firearms should receive exemplary sentences". To conclude that he nevertheless "lost sight of the need for general deterrence", as my colleague Favreau J.A. suggests, or find that he put undue emphasis on the respondent's rehabilitation, we would have to find that any judge who properly considered these sentencing objectives in the circumstances of this case was duly obliged, acting reasonably, to impose a custodial sentence on the respondent.

[76] In my view, the sentencing judge was entitled to conclude that the paramount goals of denunciation and general deterrence could be met by a conditional sentence. Although at one point in his reasons he said that these sentencing objectives "demand[ed]" a penitentiary sentence, he later stated that adding punitive elements to a conditional sentence order would "satisfy the objectives of denunciation and deterrence." Reading his reasons as a whole, I am satisfied that the sentencing judge decided that the conditional sentence order he was crafting would adequately achieve these two sentencing goals.

[77] This was a discretionary judgment call he had the authority to make. In *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 35, Iacobucci J. emphasized that "[d]epending on the severity of the conditions imposed, a conditional sentence

may be reasonable in circumstances where deterrence and denunciation are paramount considerations.” He added that “[u]ltimately … the determination of the availability of a conditional sentence depends upon the sentencing judge’s assessment of the specific circumstances of the case”. This latter assessment is discretionary by nature, and is thus entitled to appellate deference.

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[78] I also do not agree with Favreau J.A. that the sentencing judge “failed to consider Mr. Burke-Whittaker’s moral blameworthiness for the offence”, or with Hourigan J.A. that the sentencing judge “was so singularly focused on the respondent’s rehabilitative potential that he failed to analyze the respondent’s moral blameworthiness.” To the contrary, the sentencing judge spent considerable time in his reasons discussing the wrongfulness of the respondent’s actions and the gravity of his crime. He noted that the respondent’s conduct in firing his gun was “highly aggravating”, and emphasized that it was “simply a matter of moral luck” that the shot he fired did not kill or injure a passer-by. The sentencing judge also noted that the respondent had “no valid claim to self-defence here, and no valid claim that the gun was needed for protection.”

[79] Likewise, the sentencing judge – who, as Hourigan J.A. notes, is a “highly experienced criminal law judge” – did not disregard the prevalence of gun crime in the community, or its terrible effects. To the contrary, he stated:

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> This city has seen altogether too much gun crime. That gun crime has devastated communities and killed many young men. That gun crime has also claimed the lives of innocent bystanders. It is only a matter of good luck that Mr. Burke-Whittaker's actions did not claim the life of an innocent bystander.

He stated further:

> Indeed, if you bring a gun to a gathering then you are part of the problem, you are not part of the solution. Mr. Burke-Whittaker was a part of the problem when he brought that firearm to Houdini's funeral….

[80] In short, the sentencing judge expressly recognized, considered, and addressed the respondent's high degree of moral blameworthiness for the very serious crime he committed. My colleagues' real complaint seems to be that they would have assigned this factor more weight in the discretionary balancing exercise.

[81] Finally, I do not agree with my colleague Favreau J.A. that the sentencing judge failed to adequately explain why he found that there were "exceptional circumstances … that justify a sentence below the penitentiary range". Reading his reasons as a whole, these circumstances included: (i) that the respondent was a relatively youthful first offender; (ii) his background as a young Black man who grew up in "a difficult environment"; (iii) his family and community support; and (iv) the family consequences that his long-term girlfriend and their young daughter,

who the respondent financially supports, would suffer if he were incarcerated: see *R. v. Habib*, 2024 ONCA 830, 99 C.R. (7th) 110, at paras. 41-50.

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[82] As my colleague Hourigan J.A. points out, the sentencing judge did not explicitly tie these factors to his decision to impose a conditional sentence, and he did not have the advantage of this court's decision in *Habib,* which was released almost six months after his decision. However, the sentencing judge referred to each of these factors in his reasons, and stated that he was "tak[ing] them into account". He also expressly noted that "[i]t is mitigating that he has the support of his family – including his long-term girlfriend and his child, who he financially assists." On a fair reading of his reasons as a whole, I am satisfied that he viewed these factors as important aspects of the factual matrix that led him to exercise his sentencing discretion as leniently as he did.

[83] In addition, the sentencing judge was evidently strongly impressed by how the respondent had turned his life around in the four years since his offence, and by his efforts to pursue a career as a firefighter. The sentencing judge made it a term of the conditional sentence order that the respondent continue his firefighting training, and also required him to periodically reattend before the sentencing judge to provide updates on his progress.

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[84] In essence, as I read both of my colleagues' reasons, their real objection to the sentencing judge's analysis is that they believe conditional sentences in firearms cases, at least where a gun is actually discharged, should be reserved for situations where there is "significant diminished moral culpability" for the offence, and that no combination of other factors, including the impact of incarceration on the offender's rehabilitative prospects, should ever be considered sufficient to justify a non-carceral sentence. Indeed, Hourigan J.A. characterizes the need for incarceration as a matter of respecting the respondent's dignity as an autonomous moral agent.

[85] Since this also drives my colleagues' conclusion that the conditional sentence imposed by the sentencing judge in this case was demonstrably unfit, I will address this point in the next section.

(2) A conditional sentence for the respondent was not "demonstrably unfit"

[86] My colleagues both conclude that the conditional sentence imposed on the respondent in this case was demonstrably unfit. Favreau J.A. reaches this conclusion by positing that in cases where a firearm is actually discharged, a conditional sentence will only be available when there is "compelling evidence that attenuates the gravity of the offence or the moral blameworthiness of the offender

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or both". She suggests further that it was an error for the sentencing judge to impose a sentence below the ordinary sentencing range because, in her view, there were no "truly unusual" circumstances in this case. As I understand her reasons, the only circumstances that would qualify as "truly unusual" would be ones that reduced the respondent's moral culpability or lessened the gravity of his offence. Hourigan J.A. seems to be of a similar view, contending that respect for the respondent's moral agency required that he be incarcerated, because he "made the deliberate choice to bring a firearm to a funeral", and to fire it in the direction of the highway after someone on the highway began shooting.

[87] I accept my colleagues' point that there do not seem to be any other reported Ontario decisions where a conditional sentence has been imposed for a firearms possession offence where the offender was found to have discharged a gun in a public place. However, this may very well be because when the Crown can prove this aggravating factor, the accused is usually also convicted of unlawfully discharging a firearm under either s. 244 or s. 244.2 of the *Criminal Code*, R.S.C. 1985, c. C-46. Both offences carry five-year mandatory minimum sentences and thus exclude the possibility of a conditional sentence: see *Criminal Code,* s. 742.1(b).

[88] Indeed, the Crown has identified only two Ontario cases where the accused were convicted and sentenced only for firearms possession offences, despite

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evidence that they actually fired their guns. In *R. v. Jackson*, 2023 ONCA 746, this court upheld the global sentence of three years and five months imposed by the sentencing judge, while in *R. v. Fagan*, 2024 ONSC 2718, the sentencing judge imposed a reformatory-length sentence, but declined to order that it be served in the community. Neither decision stands for the broader proposition that no sentencing judge can ever impose a conditional sentence in a firearms possession case where the gun is actually discharged, regardless of their own assessment of the particular circumstances of the offence and the offender before them. In *Jackson*, this court simply deferred to the sentencing judge's decision to impose a penitentiary-length sentence. While the sentencing judge in *Fagan* concluded that imposing a conditional sentence in that case would not have adequately achieved the paramount goals of denunciation and deterrence, his views do not bind other sentencing judges, and would not have been controlling in the respondent's case even if his reasons had been available at the time of the respondent's sentencing.[1]

[89] The highly unusual circumstances that result from the Crown's decision to accept a guilty plea to only the s. 95 offence in this case undermines the force of my colleague Hourigan J.A.'s observation that the sentencing judge's decision

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[1] Coincidentally, the accused in *Fagan* and the respondent were both sentenced on the same day, May 13, 2024, although the sentencing judge in the respondent's case released his reasons for sentence a few weeks later, on May 28, 2024.

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"stands as the only recorded instance in Ontario where a s. 95 offender who discharged a firearm received a conditional sentence." While this is true, no meaningful statistical conclusions can be extracted from a data set that consists of only two reported cases. It would be equally true, but plainly spurious, to say that once the decision under appeal is added to the data set, Ontario offenders convicted only of gun possession offences who are proved to have fired their guns in public receive conditional sentences one-third of the time.

[90] I also agree with Favreau J.A. that the Crown's decision to accept the respondent's guilty plea to a possession charge that did not carry a mandatory minimum sentence "did not automatically entitle him to a non-custodial sentence." However, that is not the issue before us. Rather, we are being asked to find that a conditional sentence in this case is "demonstrably unfit": that is, that no judge could reasonably conclude that imposing such a lenient sentence on the respondent would accord with the fundamental principle of proportionality in s. 718.1 of the *Criminal Code*: see *Lacasse*, at para. 53.

[91] It is common ground that a conditional sentence was statutorily available in this case. In my view, courts should refrain from supplementing Parliament's policy choices by introducing judicially-created restrictions on the availability of conditional sentences for particular offences or factual circumstances. Lamer C.J.C. made this point in *Proulx*, at para. 81, where he held:

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> [I]t would be both unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences. Offence-specific presumptions introduce unwarranted rigidity in the determination of whether a conditional sentence is a just and appropriate sanction. Such presumptions do not accord with the principle of proportionality set out in s. 718.1 and the value of individualization in sentencing, nor are they necessary to achieve the important objectives of uniformity and consistency in the use of conditional sentences.

[92] It follows that I do not agree with my colleagues' suggestion that a conditional sentence is only available in firearms cases involving the actual discharge of a gun when the gravity of the offence or the moral blameworthiness of the offender are somehow attenuated. In my view, this rigid approach is at odds with settled authority. As Brown and Martin JJ. noted in their majority reasons in *R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366, at para. 40:

> [I]t is inappropriate for appellate courts to "artificially constrain sentencing judges' ability to impose a proportionate sentence" by requiring "exceptional circumstances" when departing from a range. Departing from a range or starting point is appropriate where required to achieve proportionality. [Citations omitted.]

More recently, in *R. v. Pike,* 2024 ONCA 608, 171 O.R. (3d) 241, at para. 182, Tulloch C.J.O. observed that in the context of conditional sentences, "exceptional circumstances" is merely a "shorthand for personal circumstances and mitigating factors that are sufficiently compelling to make a conditional sentence proportionate". He added:

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> Not only is there no closed list of such circumstances and factors, but multiple seemingly non-exceptional factors taken together, such as being a young first offender with family support who poses little risk and takes responsibility for his actions, can collectively render a conditional sentence proportionate. This is consistent with *Parranto*'s holding that sentencing must focus on proportionality, not pigeonholing cases into ill-defined exceptional circumstance categories. [Citations omitted.]

[93] As I have already discussed, the sentencing judge in this case concluded that were "some exceptional circumstances … that justify a sentence below the penitentiary range". I have already outlined the circumstances that he relied on, considering his reasons as a whole. In my view, it was open to him to conclude that this combination of circumstances were "exceptional" within the meaning of *Pike*, such that a conditional sentence was appropriate even though, as the sentencing judge recognized, such a lenient sentence would fall well below the ordinary range for such a serious offence.

[94] It follows that I do not agree with my colleagues' conclusion that the sentence imposed was "demonstrably unfit". To the contrary, I would find that the sentencing judge's determination that an exceptionally lenient sentence was justified in this case fell within the scope of his broad sentencing discretion, and is entitled to appellate deference.

[95] Finally, I would observe that Favreau J.A.'s conclusion that the conditional sentence imposed on the respondent was "demonstrably unfit" when it was

imposed some nine months ago does not sit comfortably with her conclusion that this sentence should nevertheless be upheld on appeal. I share her concern that sending the respondent to prison now would undermine his laudable and successful rehabilitative efforts. My point is simply that the concern that incarcerating the respondent would compromise his rehabilitation is not new, but was a major reason why the sentencing judge, “after much anxious consideration”, chose to exercise his broad sentencing discretion by imposing what he recognized was an exceptionally lenient sentence. In my view, it cannot be said that his choice fell so far outside the scope of reasonably available sentencing options that it was unavailable to him nine months ago, but must now be tolerated for essentially the same reasons he made it in the first place.

[96] In the result, I concur in Favreau J.A.’s proposed disposition of the appeal, and, like her, would grant leave to appeal sentence but dismiss the appeal.

“J. Dawe J.A.”

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Hourigan J.A. (dissenting):

A. INTRODUCTION

[97] The respondent pleaded guilty to one count of possession of a loaded, prohibited, or restricted firearm, contrary to s. 95(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. He received a two-year conditional sentence followed by three years of probation, which the sentencing judge acknowledged was "a break" on his sentence. The Crown appeals the sentence imposed.

[98] The facts of this case are, at once, both horrifying and familiar. There was a shootout in a parking lot by the intersection of Jane Street and Wilson Avenue, which sent a hail of bullets onto Highway 401. The shootout occurred outside a funeral viewing of a Toronto rapper who had been shot and killed the week before. Many people went to the rapper's viewing armed with guns, prepared for violence. Several people were gathered in the parking lot of the building where the viewing was taking place when a car stopped on the shoulder of the 401 and fired shots toward the parking lot.

[99] The car sped away, but at least five people in the parking lot returned fire, continuing to shoot towards the highway after the vehicle had left. The respondent was among the shooters in the parking lot. He spent most of the shootout hiding behind a dumpster, struggling to pull his gun out of his bag and fire it. The

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sentencing judge inferred that he would have participated in the firefight earlier if he had been able to properly cock the weapon and chamber a round. After the shooting subsided and the car drove away, the respondent managed to fire a single shot toward the 401, which was busy with traffic. As the sentencing judge found, this was not a case of self-defence. It was a deliberate and reckless act, consistent with the behaviour of his peers who chose to bring loaded handguns to a funeral.

[100] This court has repeated the same warning for over 20 years regarding the danger of handgun crime on our streets. The following is a representative sample of the comments made over that period:

- "There is no question that our courts have to address the principles of denunciation and deterrence for gun related crimes in the strongest possible terms. The possession and use of illegal handguns in the Greater Toronto Area is a cause for major concern in the community and must be addressed": *R. v. Danvers* (2005), 199 C.C.C. (3d) 490 (Ont. C.A.), at para. 78.
- "Handguns are an all too prevalent menace in the Greater Toronto Area. First and foremost, the sentences imposed for firearms offences must further the sentencing goals of denunciation, deterrence and protection of the public": *R. v. Brown*, 2010 ONCA 745, 277 O.A.C. 233, at para. 14.

- "This court and others have repeatedly identified gun violence, particularly in Toronto, as a pressing and very serious problem": *R. v. Paredes*, 2014 ONCA 910, 317 C.C.C. (3d) 415, at para. 44.
- "The use of guns in Toronto is a scourge to this community and must be stopped": *R. v. Doucette*, 2015 ONCA 583, 328 C.C.C. (3d) 211, at para. 59.
- "Gun crimes involving the possession of loaded, concealed firearms in public places pose a real and immediate danger to the public, especially anyone who interacts with the gun holder…A person who carries a concealed, loaded handgun in public undermines the community's sense of safety and security. Carrying a concealed, loaded handgun in a public place in Canada is antithetical to the Canadian concept of a free and ordered society": *R. v. Morris,* 2021 ONCA 680, 159 O.R. (3d) 641, at para. 68.
- "Gun violence is a scourge in our society and gun crimes must be treated with the utmost seriousness": *R. v. Akram*, 2024 ONCA 892, at para. 8.

[101] In addition to identifying the scope of the handgun crime epidemic, this court has consistently stated that only through the imposition of exemplary sentences can would-be offenders be deterred from arming themselves with handguns: *Danvers*, at para. 77; *Doucette*, at para. 59. In summary, the case law is unequivocal that gun offences jeopardizing public safety necessitate exemplary sentences that prioritize deterrence and denunciation. In this case, the need for

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deterrence is especially pressing. It is clear that the respondent and his peers believed their manhood was validated by the most cowardly of acts: firing a handgun indiscriminately in public.

[102] If an offender can bring a handgun to a funeral, fire it towards the busiest highway in the country, ultimately avoiding incarceration, then it is evident that this court's warnings about handgun violence have been rendered futile. The public rightfully relies on courts to deter crime in their communities. More importantly, they reasonably expect us to be true to our word. Our institutional credibility suffers when we claim to take handgun crime seriously and then fail to impose meaningful sentences in cases where public safety is at risk.

[103] In this case, the sentencing judge made an error in principle by prioritizing rehabilitation over the predominant principles of denunciation and deterrence. He also erred in failing to consider the respondent's moral blameworthiness for the offence. It is essential that sentences reflect an offender's moral culpability. That is not simply a matter of punishing wrongdoing; more fundamentally, it is about respecting the moral autonomy of an offender. The proper application of the value of human dignity in the current case means abiding by the normal sentencing range and acknowledging the respondent's moral culpability. He made the deliberate choice to bring a firearm to a funeral. He shot his firearm at a busy highway despite having found cover behind a dumpster. In short, he acted as a

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morally autonomous agent and should face a fit sentence, which in this case calls for incarceration.

[104] The outcome of the sentencing judge's analysis was an unprecedented and clearly unfit sentence, which contradicts the binding authority of this court and is at odds with the court's public duty to deter gun crime through the imposition of exemplary sentences. It stands as the only recorded instance in Ontario where a s. 95 offender who discharged a firearm received a conditional sentence. I would allow the Crown's appeal.

[105] It follows that I cannot accede to my colleagues' reasons for judgment. While I agree with much of Favreau J.A.'s analysis regarding legal errors committed below, I part company with her on the disposition of this case. When courts seek to communicate a message of deterrence, they must do so clearly and unequivocally. Finding an offender should have been incarcerated, but then ruling that he should now not face incarceration, hardly sends a clear message to the public. This type of analysis undermines our credibility with the public. When offenders exercise their autonomy to engage in criminal conduct, courts have a concomitant duty to impose a sentence that is consistent with that choice. This is a dual-purpose duty, which protects the public and affirms the moral autonomy of the offender.

[106] The following explains my reasoning. I hasten to add that although I reach a different disposition than my colleagues and the sentencing judge, it is evident that they sought to fashion an appropriate sentence in the circumstances. I take a different position and write this dissent because it engages fundamental issues regarding public safety, the moral responsibility of offenders, respect for the autonomy of offenders, denunciation and deterrence of handgun crime, and the court's duty to the public and its institutional credibility.

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B. BACKGROUND

(i) The Gunfight and the Aftermath

[107] The gunfight occurred on the evening of June 9, 2020, and was recorded on a security video, in which the respondent is clearly visible. The footage shows him and other attendees of the funeral viewing standing outside the building in a parking lot. Gunshots can be heard. Some individuals in the parking lot retreat through an open door into the building, while others return fire towards the 401. The highway is busy, with a constant flow of traffic.

[108] During the gunfight, the respondent takes cover behind a garbage dumpster and struggles to pull his gun from a crossbody bag he is wearing. After the shooting ceases, he runs into the building through the back door. In doing so, he fires his handgun at the 401. He fires one shot before entering the building.

[109] During the police investigation, the respondent was identified as one of the shooters. He surrendered to the police approximately one year after the incident. The police were unable to recover the firearm. On the eve of trial, the respondent pleaded guilty to one count of possession of a loaded, prohibited, or restricted firearm, contrary to s. 95(1) of the *Criminal Code*.

(ii) The Offender

[110] The respondent was 24 years old at the time of the shooting and has no criminal record other than the charge currently before the court. He was raised by his mother and grandmother in Brampton, as his father was frequently in and out of jail during much of his childhood. He completed high school and began college but did not finish his studies. The respondent has one child born in 2018.

[111] At the time of his sentencing, he had been accepted into the Toronto Fire Academy. He also used his time while on bail to start a vending machine business. Defence counsel submitted several positive character letters to the sentencing judge on the respondent’s behalf. The offender is a young Black male who has experienced systemic racism in his life. An Enhanced Pre-Sentence Report was not submitted to the sentencing judge.

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(iii) The Sentencing Judge's Reasons

[112] It is both necessary and instructive to quote extensively from the reasons for sentence to illuminate the sentencing judge's thought process and understand where, in my view, he erred. Before the sentencing judge, the Crown sought four years of incarceration while the defence argued for a sentence of two years less a day to be served in the community. After reviewing the positions of the parties, the sentencing judge considered the mitigating and aggravating factors. Regarding mitigating factors, he stated at para. 29:

> There are numerous mitigating factors in this case. Most importantly, Mr. Burke-Whittaker has pleaded guilty and expressed remorse for his actions. I accept that his remorse is sincere. As I said, he has written a very articulate letter to the court and has expressed his remorse to the court twice. It is mitigating that he has the support of his family – including his long-term girlfriend and his child, who he financially assists. It is mitigating that he has made real strides while on bail for this offence, including starting a small business and applying to and being accepted in a firefighting program.

[113] With respect to aggravating factors, the sentencing judge focused on the nature and circumstances of the offence at paras. 31-33:

> The nature of the offence is aggravating. Mr. Burke-Whittaker brought a gun to a funeral viewing. He had it in public. I draw the inference that he was expecting some kind of trouble and that he was prepared to deal with that trouble using a firearm.

> It is particularly aggravating that he discharged that firearm. The context is important. When the shooting started, many people took cover behind a dumpster, pulled out a firearm, and shot back. Mr. Burke-Whittaker pulled out his firearm. He struggled with cocking it, however. I infer that he would have participated in the firefight if he had been able to properly cock the weapon and chamber a round. When he was finally able to do so, the shooting was over and most of the people behind the dumpster had fled into the adjacent building. He fired towards the highway, and then fled into the building as well.
>
> Mr. Burke-Whittaker's actions in firing that weapon are highly aggravating. It was not fired in self-defence. He was perfectly safe with the dumpster between him and whoever was shooting from the shoulder of Highway 401. The shooting had apparently finished by the time he fired the round, although I accept it was a dynamic situation and he may not have been aware of that. Most importantly, Mr. Burke-Whittaker fired a round in the direction of a busy highway with traffic roaring by. That round could have easily hit a passing vehicle and killed or injured people. It is simply a matter of moral luck that it did not do so.

[114] The sentencing judge went on to correctly identify the sentencing principles in play in the case, stating, "deterrence and denunciation take precedence in a case involving the possession of a firearm and the discharge of that firearm. I agree that rehabilitation must play a role, but that role must be secondary to the principles of denunciation and deterrence."

[115] The sentencing judge rejected the Crown's position on sentence in a highly unusual manner at para. 43:

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> The Crown's submission that a sentence of four years should be imposed is well within the range of sentence for similar types of offences and similar types of offenders. On the other hand, this offence happened four years ago. Mr. Burke-Whittaker turned himself in about a year after that. He has now been on bail for just about three years. That is a lot of water under the bridge.

[116] Having rejected the Crown's position, the sentencing judge proceeded to impose a sentence he deemed fit at para. 44:

> Although my first inclination was to sentence Mr. Burke-Whittaker to a term in the penitentiary, and certainly deterrence and denunciation demand that I do so, my view is that there are some exceptional circumstances here that justify a sentence below the penitentiary range. I have wrestled with this case, and ultimately, I think that there is no social utility in this particular case in sending Mr. Burke-Whittaker to the penitentiary. I am persuaded that this is one of those exceptional cases mentioned by my colleague Code J. in *Collins* that justifies a departure from the normal range. In my view, Mr. Burke-Whittaker does not represent a danger to the community at this point. Accordingly, after much anxious consideration, I will sentence Mr. Burke-Whittaker to a sentence of two years less a day. After considering whether that sentence is in accordance with the purposes and principles of sentencing, especially the principle of rehabilitation, I am satisfied that he can be served in the community. I am not, however, going to make it easy for him because there still must be a punitive element to the sentence in order to satisfy the objectives of denunciation and deterrence. I am therefore also going to put him on probation for three years. He will thus be subject to state supervision for one day short of five years, in addition to the time he has spent on bail. As well, I am going to require that he attend before me from time to time, which I believe I have jurisdiction to do, while he is on his

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> conditional sentence. Every now and then, people come before the court who deserve a break, something that is out of the ordinary – and in this case I am going to give such a break to Mr. Burke-Whittaker, but, as I say, I am not going to make it easy for him.

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[117] The sentencing judge relied on *R. v. Collins*, 2023 ONSC 5768, to justify the imposition of a conditional sentence. In *Collins*, the accused was charged with drug trafficking and possession of a firearm. Following a guilty plea, Code J. imposed a conditional sentence of two years less a day.

C. ANALYSIS

(i) Standard of Review

[118] There can be no debate that the sentence imposed deserves considerable deference on appeal. It is not our role to reweigh the factors considered by the sentencing judge in his analysis of a fit sentence in the circumstances.

[119] Appellate intervention is justified only where: (1) the sentence imposed is demonstrably unfit; or (2) the sentence results from an error in principle, a failure to consider a pertinent factor, or the erroneous consideration of an aggravating or mitigating factor: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11, 44. To justify appellate interference, it should be evident from the sentencing judge's decision that such an error affected the sentence: *Lacasse*, at para. 44; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at paras. 26-28. If there is an error

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in principle that influences the sentence, the appellate court "may sentence the appellant afresh without deference, save for the findings made by the sentencing judge": *R. v. Nahanee,* 2022 SCC 37, 474 D.L.R. (4th) 34, at para. 61; *Friesen*, at para. 28.

[120] Dawe J.A. provides a vigorous defence of the standard of review and deference, arguing that we should defer to the sentencing judge's broad discretion. However, it is obvious on a review of the sentencing judge's reasons that there are manifest errors in principle, as will be discussed below. This is not a case of reweighing factors; it is an exercise in correcting clear legal errors. Further, and as will be discussed below, the sentence is clearly unfit, as it is plainly inadequate and is a substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

[121] While deference is owed to sentencing judges, appellate courts have a duty to review and correct sentences that are unfit or based on errors in principle. That is part of our responsibility to the public to shape and give guidance on the criminal law. We do not satisfy our duty to the public when we fail to correct manifest legal errors and permit unfit sentences to stand undisturbed. If this is not a case where this court is obligated to fulfill its public duty by correcting a sentence, it is hard to imagine where we would ever intervene.

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[122] Finally, it is worth observing that Dawe J.A.'s commitment to deference only goes so far. I note with interest that he relies on *R. v. Habib*, 2024 ONCA 830, at paras. 41-50, for the proposition that a sentence to be served in the community has a lesser impact on the respondent's girlfriend and child. This proposition was not explicitly relied on by the sentencing judge and was not argued before this court. My colleague, in his defence of deference, apparently has no issue with supplementing the sentencing judge's reasons.

[123] In any event, while the impact of incarceration on an offender's family may be a factor that might have an impact on sentence, it would have to be weighed against other factors, including, most importantly, the impact of the crime on the victim and their family. In *Habib*, at para. 43, the court stated regarding the consequences on an offender's family: "As emphasized in *Spencer*, these consequences are not an excuse to overlook the harm that the defendant's criminal conduct caused victims of crime, or the importance of protecting those victims and society, or the need for denunciation and deterrence." As will be discussed in the next section of my reasons, care must be exercised in ensuring that a sentence is respectful of an offender's autonomy. When an offender chooses, on their own volition, to engage in criminal conduct, we must assume that they considered the potential consequences on their family.

(ii) Error in Principle - prioritizing rehabilitation over denunciation and deterrence

[124] There is much to unpack in paragraph 44 of the Reasons for Sentence. It is clear that the sentencing judge, who is a highly experienced criminal law judge, worked diligently to craft an appropriate sentence. However, in my opinion, deference is not warranted in this case because, respectfully, the sentencing judge erred in principle. The sentencing judge acknowledged that "deterrence and denunciation" must take precedence and that they "demanded" a penitentiary sentence. However, he then imposed a conditional sentence. In doing so, he improperly allowed the respondent's rehabilitative prospects to dominate the analysis, ultimately losing sight of the primacy of denunciation and deterrence in this case.

[125] This error manifests at several points in the sentencing judge's analysis. The first example is the sentencing judge's comment regarding "water under the bridge." This statement referred to the respondent's rehabilitative progress, specifically his efforts since committing the offence. However, the narrow focus on rehabilitative prospects overlooks the necessity for an exemplary sentence that would strongly denounce the offender's actions and serve as a deterrent.

[126] A second example of the sentencing judge's singular focus on rehabilitative prospects was his statement that there is "no social utility" in sending the

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respondent to the penitentiary because he “does not represent a danger to the community at this point.” Clearly, the sentencing judge only considered the utility of a jail sentence from a rehabilitative standpoint. He overlooked the fact that a jail sentence has obvious social utility as the mechanism courts use to achieve the paramount goals of denouncing and deterring gun crime.

[127] Third, the sentencing judge explicitly relied on rehabilitation as the primary sentencing principle justifying a conditional sentence instead of incarceration: “After considering whether that sentence is in accordance with the purposes and principles of sentencing, especially the principle of rehabilitation, I am satisfied that [it] can be served in the community.”

[128] Fourth, the sentencing judge considered denunciation and deterrence only as secondary objectives after deciding the sentence should be served in the community. He noted the necessity of adding a sufficiently punitive element to the sentence. To achieve this, the sentencing judge imposed a probation order, stating: “I am not, however, going to make it easy for him because there still must be a punitive element to the sentence in order to satisfy the objectives of denunciation and deterrence. I am therefore also going to put him on probation for three years.” This conclusion is flawed for two reasons. First, as he acknowledged earlier in his reasons, it was an error in principle not to treat denunciation and deterrence as the paramount sentencing objectives. Second, probation is a

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"rehabilitative sentencing tool" and does not "particularly seek to fill the need for denunciation of the offence or the general deterrence of others to commit the same or other offences": *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 32.

(iii) Error in Principle - failure to consider the respondent's moral blameworthiness

[129] The second error in principle flows from the first. The sentencing judge was so singularly focused on the respondent's rehabilitative potential that he failed to analyze the respondent's moral blameworthiness.

[130] Had he focused on this issue, he would have inevitably concluded that the balance of evidence did not establish a diminished moral blameworthiness that would justify a lenient sentence. On the one hand, we know that the respondent acted deliberately and not in self-defence. He chose to emulate his peers by treating a loaded handgun as an essential accessory to bring to a funeral and fired it at a busy highway. On the other hand, the respondent proffered no explanation for this conduct and no *Morris* report was filed. The failure to focus on moral blameworthiness is an error not only because it prevents criminal conduct from being properly punished, but also because it offends the respondent's human dignity.

[131] Courts often employ the language of human dignity when they characterize sentences as disproportionate and excessive: see e.g. *R. v. Bissonnette*, 2022

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SCC 23, 469 D.L.R. (4th) 387, at paras. 5-9. But a consideration of dignity in the context of sentencing need not always lead to a reduction in sentence. On the contrary, the imposition of a strong but fit sentence furthers the value of human dignity by emphasizing the moral autonomy of the offender.

[132] The idea that the punishment of offenders promotes human dignity is a cornerstone of our criminal justice system. As Gonthier J. held, "it could be said that the notion of punishment is predicated on the dignity of the individual: it recognizes serious criminals as rational, autonomous individuals who have made choices. When these citizens exercise their freedom in a criminal manner, society imposes a concomitant responsibility for that choice": *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 73, *per* Gonthier J. (dissenting). Similarly, Lamer C.J. wrote of the "hallowed principle that criminal punishment…should also be imposed to sanction the moral culpability of the offender": *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at para. 79. One academic commentator concludes that punishment "affirms what is wrong, holds the individual wrongdoer accountable for their actions, and in doing so, affirms the moral autonomy of the offender as well as the integrity of society and the dignity of others": Blair Major, "The Puzzle and Promise of Human Dignity: *R v Bissonnette*" (2024) 33:1 Constitutional Forum 49 at 63.

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[133] In my view, a proper application of the value of human dignity in the current case means abiding by the normal sentencing range and acknowledging the offender's moral culpability. He made the deliberate choice to bring a firearm to a funeral. He shot his firearm in the direction of a busy highway despite having found cover behind a dumpster. In short, he acted as a morally autonomous agent and should face a fit sentence, which in this case calls for incarceration.

[134] For these reasons, the sentencing judge made errors in principle, and his sentence cannot stand.

(iv) Unfit Sentence

[135] As noted by Brown J.A. in *R. v. Altiman*, 2019 ONCA 511, 56 C.R. (7th) 83, at para. 44:

> Courts have used a variety of expressions to describe a sentence that is "demonstrably unfit". It is a sentence that is: "clearly unreasonable"; "clearly or manifestly excessive"; "clearly excessive or inadequate"; or that represents a "substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes". [Citations omitted.]

[136] The sentencing judge's conditional sentence contradicts a long line of authority from this court and the Superior Court of Justice. Indeed, as noted, there is no Ontario case where a s. 95 offender discharged a firearm and received a conditional sentence. In instances of simple possession for first-time offenders who

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were not otherwise engaged in criminal activity, the typical outcome is generally at the high end of a reformatory sentence or low penitentiary sentence. For example, see the following sentences: *R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, at para. 206, aff'd 2015 SCC 15, [2015] 1 S.C.R. 773 (40 months); *R. v. Smickle*, 2014 ONCA 49, 317 O.A.C. 196, at para. 19 (two years less a day); *Habib* (three years). None of these cases involved the discharge of a firearm.

[137] This jurisprudence, addressing situations in which there was no discharge of a firearm, strongly suggests that in a case where an offender discharges a firearm, a penitentiary sentence is warranted. Possession of an illegal handgun creates potential danger to the public. That danger increases exponentially when the firearm is discharged in public. It would take an extraordinary set of circumstances, where the offender's moral culpability was greatly reduced, to justify something less than a penitentiary sentence. As noted by this court in *R. v. Smith*, 2023 ONCA 620, at para. 7, citing *Proulx*, at para. 58: "if a penitentiary term of imprisonment cannot be excluded, then a conditional sentence should not be imposed".

[138] Typically, an offender who discharges a firearm faces a charge of reckless discharge under s. 244.2(1)(b) of the *Criminal Code*, which carries a mandatory minimum sentence of five years where a restricted or prohibited firearm is used or the offence is committed in association with a criminal organization. This case is

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somewhat unique because the respondent pleaded guilty only to possession, with the firing of the gun accepted as an aggravating factor. Therefore, he was not subjected to the five-year mandatory minimum sentence.

[139] There are two cases in Ontario where guilty pleas were entered for possession of a firearm, and the fact that the gun was fired was acknowledged as an aggravating factor. In *R. v. Jackson*, 2023 ONCA 746, this court upheld a penitentiary sentence of three years and five months for an accused who pleaded guilty to one count of possession of a firearm and one count of possession of a prohibited device. In *Jackson*, the offender was involved in a shootout when he and his associates were ambushed by another group of individuals. The respondent fired nine shots and was shot in the leg during the gunfight. The sentencing judge recognized that the respondent armed himself with a firearm due to an incident a few weeks prior when he had been shot.

[140] The second decision is *R. v. Fagan*, 2024 ONSC 2718. In this case, the accused pleaded guilty to possession of a loaded restricted firearm. He and his girlfriend were in an SUV when a silver sedan began to chase them and attempted to cut them off. The accused fired his gun at the silver sedan five times but did not hit anyone. The offender had no prior criminal record. The sentencing judge benefited from an Enhanced Pre-Sentence Report and, relying on it, stated he was "satisfied that anti-Black racism played some role in limiting Mr. Fagan's

educational opportunities, shaping his worldview, and narrowing his potential peer group. All of that contributed to bringing Mr. Fagan to a point in his life where he believed, wrongly to be sure, that arming himself with a handgun was the only way he could remain safe": *Fagan*, at para. 81.

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[141] Additionally, the offender had made significant progress towards rehabilitation. The sentencing judge in *Fagan* determined that these factors justified a departure from the usual penitentiary range and warranted a sentence of two years less a day. However, he rejected a conditional sentence due to the offender's firing of the gun in public. He concluded, at para. 99: "The gravity of Mr. Fagan's crime makes a conditional sentence inappropriate. Only a custodial sentence is adequate to the task of denouncing Mr. Fagan's serious crime and sending an unambiguous message to others that if they discharge a firearm in a public place, they will pay a heavy price."

[142] I am not persuaded that *Fagan* is a persuasive authority regarding the range of sentence. In that case, an Enhanced Presentence Report was filed, which provided the court with in-depth insight into the impact of systemic racism on the offender and its connection to the offence. The court relied on this evidence in departing from the normal range. There was no such evidence in this case. In fact, as the sentencing judge found, the respondent's letter to the court did not suggest that there was a connection between systemic racism and the obstacles that he

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had to overcome in his life, let alone suggest that systemic racism played a role in the commission of the offence.

[143] During oral submissions, the Crown relied on Tulloch C.J.O.'s decision in *Habib*. There, the accused was charged with possession of a firearm and sentenced to four years in prison. The accused impulsively brandished a handgun during an altercation with a pizza store employee who refused to serve him. The accused chased the employee to the back of the store, but no shots were fired. On appeal, Tulloch C.J.O. reduced the sentence to three years because the sentencing judge breached the accused's right to be heard by finding that he intended to kill the employee without providing the accused with an opportunity to respond to this issue.

[144] In these circumstances, a conditional sentence was found to be unfit and inadequate to achieve the goals of sentencing. Tulloch C.J.O. explained: "As this court has long recognized, '[t]he possession and use of illegal handguns … is a cause for major concern,' and 'courts have to address the principles of denunciation and deterrence for gun related crimes'": *Habib*, at para. 6, citing *Danvers*, at para. 78. This was true notwithstanding the following mitigating circumstances: the accused had turned his life around by accepting responsibility and cutting ties with negative peers, pursued his education, built a productive career, and financially supported his family.

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[145] Regarding the sentencing judge's reliance on *Collins*, there were significant mitigating factors in that case, which the sentencing judge did not highlight. These included: two violations of the accused's *Charter* rights by the police, the fact that the accused's mother was a sex worker who struggled with drug addiction and was brutally murdered when the accused was 13, the accused was diagnosed with PTSD after he was the victim of armed robberies and a shooting, the fact that his best friend was shot and killed, the accused's success in completely turning his life around by developing a career in music, and the accused's commitment to working with at-risk youth in the community.

[146] Code J. held that a departure from the normal custodial sentence in firearm possession cases could be justified where there are exceptional mitigating circumstances that relate both to diminished moral culpability and the complete reformation of the accused while on bail. In *Collins*, there was diminished moral culpability due to the extraordinary challenges the accused encountered when growing up. These facts render the case an inapt comparator to the present case and thus the sentencing judge's reliance on it was misplaced. I also note that in *Collins*, the firearm was not discharged.

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(v) Fit Sentence

[147] Given my conclusion that the sentencing judge erred in principle and that the sentence is unfit, it falls to this court to craft a fit sentence.

[148] The Crown seeks a sentence of four years imprisonment less pre-trial credit, *Downes* credit, and credit for the respondent's time under the current Conditional Sentence Order. The respondent's counsel submits that, given the rehabilitative progress he has made, the respondent should not be incarcerated.

[149] I believe that the appropriate starting point for a sentence is finding a point between the sentence in *Jackson* (three years and five months) and *Habib* (three years). The facts of this case are more serious than *Habib* given that no shots were fired in that case. In *Jackson*, nine shots were fired, so I am prepared to accept that the sentence here should be less than in that case, even though there were other mitigating circumstances, including that Mr. Jackson was shot during the shootout and armed himself as a consequence of a recent incident where he had been shot. I would sentence the respondent to 38 months.

[150] From this figure, this court should make the necessary deductions, all of which the Crown conceded. There is no dispute between the parties that the respondent is entitled to 43 days of *Summers* credit. The Crown also conceded that the respondent is entitled to one-to-one credit for his time under the

Conditional Sentence Order. Using May 13, 2024 as the starting date – the date of sentence – this amounts to 290 days (as of February 26). Finally, the Crown conceded before the sentencing judge that the respondent is entitled to four to six months of *Downes* credit. Therefore, I would deduct a total of 513 days or 17 months (i.e., 43 days plus 290 days, plus six months or 180 days), for a net sentence of 21 months.

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(vi) Incarceration

[151] The remaining question is whether the respondent should be required to serve his sentence in custody or the community. Favreau J.A. concludes that he should not be incarcerated based on the rehabilitative progress he has made since his sentencing. In my view, this conclusion is a repeat of the error made by the sentencing judge in that it elevates rehabilitative prospects over the importance of deterrence and denunciation. Although the respondent's rehabilitative progress, as evidenced by the fresh evidence filed, should be commended, rehabilitation cannot overwhelm the primary goals of deterrence and denunciation.

[152] Favreau J.A. explains her disposition at para. 64 in the following terms:

> In such circumstances the obvious question is: why not simply find the sentencing judge committed no error in deciding that there were exceptional circumstances and that the sentence imposed was fit? The answer is because denunciation and deterrence are aimed in part at discouraging others from committing similar offences.

> While I would spare Mr. Burke-Whittaker from incarceration and a penitentiary sentence at this point in the process, the sentence was nevertheless demonstrably unfit at the time it was imposed. This court has repeatedly condemned gun violence and must continue to do so. The circumstances of the offence and Mr. Burke-Whittaker's circumstances did not justify a non-custodial sentence of less than two years in this case. While the outcome is the same for Mr. Burke-Whittaker as if the sentence was found to be fit, this court must remain unequivocal in sending the message that an offence of this nature, which included the discharge of a firearm in a public place, requires a significant period of incarceration, unless there are truly unusual circumstances.

[153] It is worth reflecting on our duty to the public when it comes to sentencing. I close with an observation about the relationship between the imposition of appropriate sentences and the maintenance of public trust in the Canadian judicial system. Canadian courts recognize that the imposition of a sentence upon an offender implicates vital communal values. As Lamer C.J. held in *M.(C.A.)*, our criminal law is a "system of values": at para. 81.

[154] One key value in the sentencing context is protection of the public. Protection of the public is "[u]nquestionably a principal aim of sentencing" and "will ordinarily be seen to be enhanced by individual and general deterrence as well as incapacitation": *R. v. Wallner*, 1988 ABCA 308, 62 Alta. L.R. (2d) 111, at para. 8; see also *R. v. Berner*, 2013 BCCA 188, 297 C.C.C. (3d) 69, at para. 9.

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[155] Judges also bear a duty to "ensure that sentences in particular cases are kept more or less in line with other sentences for the same offence": *R. v. Vaudreuil* (1995), 98 C.C.C. (3d) 316 (B.C.C.A.), at para. 2. The Canadian public expects judges to generally abide by sentencing ranges. Unjustified departures from those ranges diminishes public trust in the judicial system and damages the stability of our judicial institutions.[2] This is especially the case when it comes to handgun crime, which this court has repeatedly said must be the subject of exemplary sentences that emphasize denunciation and deterrence. Failure to follow through on that undertaking directly impacts communities plagued by handgun crime.

[156] Turning back to Favreau J.A.'s explanation for her disposition in this case, I fear that it may undermine our institutional credibility. The bottom line is that she agrees that the respondent should have been given a sentence of incarceration in a penitentiary, but the result is that he will be serving his time in the community. That is hardly an unequivocal message of deterrence and denunciation. To be effective, such a message should be clear and understandable by the public. Alas, the message from Favreau J.A. is muddled at best: fire a handgun in public and

[2] Such departures also implicate judicial independence. As former United States Supreme Court Justice Anthony Kennedy put it, "Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must": U.S., *Senate Committee on the Judiciary: Hearing on Judicial Security and Independence* (2007) (Associate Justice Anthony M. Kennedy).

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you will be incarcerated unless you get the benefit of an unfit sentence, in which case you will be permitted to serve your sentence from your home.

[157] The respondent has not served the majority of his sentence and there would be a further 21 months of a fit sentence to be served. Based on the primary goals of sentencing and the seriousness of the offence, it is in the interests of justice that he be incarcerated. Indeed, this case cries out for the imposition of incarceration. Would-be offenders, including those who view the firing of handguns in public as socially acceptable, even fashionable, must be made aware that if they engage in this conduct they will, absent exceptional mitigating circumstances that relate both to diminished moral culpability and complete reformation while on bail, inevitably face incarceration. To rule otherwise ignores the injunctions of this court dating back over 20 years.

D. DISPOSITION

[158] I would allow the appeal, set aside the sentence imposed by the sentencing judge, and impose a sentence of 38 months incarceration less credit of 17 months.

Released: February 26, 2025 “C.W.H.”

“C.W. Hourigan J.A.”