IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CRI-2021-019-002794
[2026] NZHC 2040

THE KING

v

DWIGHT PERCIVIL FATU

Hearing:	16 July 2026
Counsel:	JN Hamilton (by VMR) and S McCabe for Crown SR Lack for Defendant
Judgment:	16 July 2026

SENTENCING REMARKS OF DOWNS J

Solicitors:
Crown Solicitor, Hamilton.

Introduction

[1] Dwight Fatu, you are for sentence for:

(a) Supplying methamphetamine between 28 March 2020 and 1 August 2020.

(b) Possessing a precursor substance with the intention it be used to make methamphetamine.

(c) Participating in an organised criminal group between 1 October 2019 and 7 June 2021.

[2] In what follows, I shall speak to you and the public as succinctly and simply as possible.

The offending

[3] Your offending was detected in consequence of a police and customs investigation called "Operation Equinox". The investigation began in 2019. It ended in 2021. You were arrested in June that year.

[4] You were part of a criminal syndicate associated with the Waikato chapter of the Comanchero gang. X was the head of the chapter; you were its Sergeant at Arms. Because of your role, you enjoyed a close association with other members of the gang and were, as the agreed summary of facts records, "plainly aligned with the syndicate's drug dealing activities".

[5] You used an encrypted ANØM device to facilitate your offending between 28 March and 1 August 2020. You directly supplied at least one kilogram of methamphetamine in that time. I continue from the summary of facts. You sourced methamphetamine from X. You sold it to your own customers. Your "trade craft" was careful. You were vigilant you were not surveilled.

[6] In addition to your own drug dealing, you collected large amounts of money on behalf of the syndicate. You made it clear to others in the syndicate you wished it

to focus on supplying methamphetamine outside the Waikato area, where prices for methamphetamine were higher. You had a significant role in the distribution of methamphetamine, and a central role in the gang's activities. As I have said, you were involved in the direct supply of at least one kilogram of methamphetamine.

[7] On 11 May 2021, you took delivery of 20 litres of hypophosphorous acid from other members of the syndicate. You knew the acid was going to be used to make methamphetamine. You intended it would be used that way.

Starting point

[8] There is no profound difference of opinion in relation to the starting point for your primary offence of supplying methamphetamine, which carries a maximum penalty of life imprisonment.[1] The Crown advances a starting point of 11 or 11 and a half years' imprisonment. On your behalf, Mr Lack advances a starting point of not more than 10 years' imprisonment.

[9] I consider an 11-year starting point commensurate with the amount of methamphetamine you supplied, your role — which was significant — and like cases, which I shall collect in a footnote to my written remarks. [2]

[10] The Crown argues that starting point should be uplifted by 18 months for your other offending. Mr Lack says one year.

[11] I add one year only. I do not add more because your role in the syndicate and in the direct supply of at least one kilogram of methamphetamine overlapped. The same is particularly true of your possession of the large amount of hypophosphorous acid. The addition of one year for the rest of your offending should not obscure the

1 Misuse of Drugs Act 1975, s 6(1)(c).

2 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648; *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509; *Chai v R* [2020] NZCA 202; *Miller v R* [2020] NZCA 131; *Flavell v R* [2024] NZCA 317; *Wellington v R* [2020] NZCA 277; *Hall v R* [2020] NZCA 183; *R v MacFarlane* [2023] NZHC 172; and *Clark v R* [2020] NZCA 641.

fact it would attract a much higher starting point if it were dealt with discretely.[3] In other words, the one-year uplift does not constitute a precedent.

[12] You have a bad record of drug dealing. It is common ground I should add a year to your sentence because of this feature, and I return to that topic shortly.

Mitigating features

Personal circumstances

[13] Mr Fatu, I now move to your personal circumstances. These are described in an extensive cultural report and in a much shorter, but nonetheless helpful, pre-sentence report.

[14] You were exposed to gangs, alcohol, and controlled drugs from a young age. Your upbringing was difficult to say the least. At the age of 18, you were convicted of manslaughter and imprisoned. You became a patched gang member in prison. You have been in and out of prison ever since.

[15] Your gang associations have endured, most recently with the Comanchero gang. You say you have severed all gang connections. I have not sighted any hard evidence to support that proposition, albeit Mr Lack says you remain segregated in prison in consequence of your departure from the gang.

[16] You have been a user of methamphetamine and other drugs. You say you have been free of drugs since being in prison. You say also you wish to put your life of crime behind you.

[17] You seek a 15 percent discount for your background and drug use. I do not doubt your upbringing has contributed to your offending, as has your drug use somewhat. Whether your drug use is as bad as it is said in your cultural report is open to doubt, but in any event, I allow a 15 percent deduction. I do so because I consider a meaningful deduction is required in recognition of your background.

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3 *Wilson v R* [2011] NZCA 197; *R v Dunn* [2021] NZDC 24848; *R v Lum* [2015] NZHC 629; *R v Goldsworthy* [2014] NZHC 2577; *R v Malu* HC Auckland CRI-2010-055-1742, 29 November 2011.

[18] I turn to your record. In 2004, you received an eight-year term of imprisonment for selling methamphetamine, making that drug, and other drug offending. In 2013, you were given an eight-and-a-half-year sentence for conspiring to deal methamphetamine and possessing equipment and material. It is, therefore, not an exaggeration to say much of your adult life has been spent in prison for commercial drug dealing.

[19] The Crown and Mr Lack agree one year should be added for this feature. I accept their analysis.

Guilty pleas

[20] I turn to guilty pleas. You were charged 18 June 2021. You pleaded guilty 2 June 2026, a little under four years later. You argue you should receive a 20 percent discount for your guilty pleas. The Crown does not contest that figure. I am not bound by it as it is my responsibility to sentence according to law, rather than in accordance with the parties' wishes.

[21] The amount of credit for a guilty plea(s) must, following the Supreme Court's decision in *Hessell v R*,[4] reflect all relevant circumstances including delay, the strength of the prosecution case, and the value of the plea.

[22] You and many other defendants contested the admissibility of the ANØM evidence. That challenge was heard in the High Court in late 2023. On 12 March 2024, the High Court held the evidence admissible.[5] You and many others applied for permission to challenge that conclusion in the Court of Appeal. You and they were given permission to do so. But the appeal was dismissed 9 September 2025.[6] You and other defendants then sought permission to appeal to the Supreme Court. The Supreme Court declined permission 21 November 2025.[7]

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4 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
5 *R v Gear* [2024] NZHC 464.
6 *Gear v R* [2025] NZCA 459.
7 *Diamond v R* [2025] NZSC 173.

[23] You commenced plea negotiations with the Crown after the decision of the Court of Appeal, but while you were still awaiting a decision from the Supreme Court. You pleaded guilty, as I have said, 2 June this year albeit on the basis essentially offered to the Crown in September 2025.

[24] So, given all this, what is the appropriate level of discount for your guilty pleas? I begin with the factors that could be said to favour a 20 percent reduction, factors implicit to Mr Lack's submission:

(a) Like any defendant charged with an offence, you were entitled to challenge the admissibility of evidence.

(b) You had a credible basis to do so given the FBI's collection of the ANØM evidence would probably be unlawful if done here — a point the Court of Appeal and Supreme Court identified.

(c) A related argument would be that a credible system of justice should not condone unlawful behaviour by the state — or state actors. There is also a related human rights point, but I will say more about that later.

[25] But on the other hand:

(a) A prompt guilty plea attracts a maximum discount of 25 percent, and 20 percent is not greatly different from that figure.

(b) An early guilty plea is often indicative of acceptance of responsibility by an offender, a key policy reason for guilty plea discounts.

(c) There are obvious dangers in *incentivising* defendants to challenge evidence or bring analogous applications that could result in charges being dismissed. These include damage to public confidence in the administration of criminal justice.

(d) The admissible evidence against you was overwhelming.

[26] All this being so, I think it would be wrong to discount the starting point by 20 percent. I instead apply 15 percent. This figure recognises there is some value to your pleas, while also recognising the factors I have mentioned and one other: the systemic cost of the admissibility challenge. Systemic cost is not mere abstraction. If many defendants challenge the admissibility of evidence, as you and others did, this effects when trials can take place, including when trials can take place for defendants *unconnected* to you.

Undue delay?

[27] Mr Lack argues you should receive "a reduction of at least 20 percent" for undue delay in connection with your case. The submission is based on the right of every defendant to be tried without undue delay under s 25(b) of the New Zealand Bill of Rights Act 1990. Any deduction in this context must hinge on a conclusion the delay has been undue; in other words, that there has been a breach of the right protected by the Bill of Rights Act.

[28] You were arrested June 2021. As I have said, you were charged the same month. Much of the delay since then is directly referable to your admissibility challenge and the related challenge by other defendants. As I explained that challenge was heard by the High Court in December 2023, with it ruling in March 2024. This period could not be considered undue and I did not understand Mr Lack to argue otherwise, at least strenuously. But, of course, your case did not end there, as you sought and were given permission by the Court of Appeal to appeal. Its ruling was delivered September 2025. The Supreme Court's ruling was delivered swiftly thereafter. By then — that is November 2025 — you had been before the courts for approximately four and a half years. Today's sentencing is five years and one month after your arrest.

[29] This period is long by any measure. In an important case called *Williams v R*, the Supreme Court held a delay of almost five years between arrest and conviction

was undue, meaning unjustified.[8] But the Court also made clear whether delay is unjustified is a function of time, cause, and circumstance.[9]

[30] I do not know of a case in which an admissibility determination has affected so many charges and defendants, indeed, across three otherwise unrelated trials. For example, there are or were almost 800 charges. Nor I do know of any other case that has involved this technology, or technology quite like it. The significant involvement of a law enforcement agency outside New Zealand is also unusual, albeit far from unprecedented. Taken together, I consider these features have produced a case that is exceptional in its demands upon the courts, and the delay is justified accordingly.[10] I decline an allowance on the basis I discern no breach of your right.

[31] I add a brief observation, and it is an observation only. It is somewhat awkward to apply the concept of the right to trial without undue delay in a setting in which so much energy has been focussed on matters other than a trial.

A discount for the behaviour of the FBI?

[32] The Court of Appeal concluded the Federal Bureau of Investigation probably breached s 216B of the Crimes Act 1961 by intercepting communications in relation to the ANØM devices.[11] You argue this "foreign state illegality ... warrants a reduction of at least 20 percent".

[33] I respond in three points.

[34] First, you do not argue your right to be free from unreasonable search and seizure under s 21 of the New Zealand Bill of Rights Act was breached, as you acknowledge the Court of Appeal concluded the FBI was not bound by the New Zealand Bill of Rights Act. It follows your case does not involve a breach of the Bill of Rights Act. Rather, it involves unfairly obtained — but nonetheless admissible — evidence.

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8 *Williams v R* [2009] NZSC 41, [2009] 2 NZLR 750.
9 At [12].
10 *R v Bublitz* [2019] NZHC 593 and *R v Cho* [2018] NZHC 561 are distinguishable.
11 *Gear v R*, above n 6, at [152], [171] and [188].

[35] Second, another High Court Judge recently declined the same deduction.[12]

[36] Third, and to my mind most importantly, ANØM devices are different from mobile phones. The devices cannot be used to make or receive phone calls — they are *not* mobile phones. Consequently, ANØM devices are not used by countless billions of people the world over, for everything that modern life entails. Instead, ANØM devices were used by small groups of people, including the syndicate of which you were part, to coordinate serious criminal activity. Indeed, the Supreme Court noted the devices were designed for that very purpose.[13]

[37] All this being so, no genuine human rights concern emerges in this case. A discount would, therefore, be inapt.

[38] I recapitulate. I adopt an 11-year starting point, add one year for the rest of the offending, and deduct 30 percent for mitigating features; that is 15 percent for your plea, and 15 percent for your background and drug use. I then add a year for your record. This produces a sentence of nine years and five months' imprisonment.

A minimum period of imprisonment?

[39] The Crown seeks a minimum period of imprisonment of 60 percent. On its behalf, Ms Hamilton emphasised the scale of your offending, your seniority within the gang/criminal syndicate, and your record of drug dealing.

[40] As you will have been told, a minimum period may be imposed when the ordinary parole period is insufficient for any or all of these purposes:[14]

(a) Holding the offender accountable.

(b) Denouncing the conduct.

(c) Deterring the offender or others from committing like offending.

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[12] *R v Lapuaho* [2026] NZHC 617.
[13] *Diamond v R*, above n 7, at [9].
[14] Sentencing Act 2002, s 86.

(d) Protecting the community.

[41] Several things support the imposition of a minimum term. First, the gravity of your offending. Second, your role within the syndicate/gang. And third, your record. Mr Fatu, let me be direct: as the Crown says, you are a recidivist commercial drug dealer.

[42] However, as against these things, you are now at an age at which recidivism tends to taper, and the Parole Board is well placed to assess your risk. I, therefore, decline a minimum period. In so doing I place no weight on your claim you have severed all gang connections. As I said earlier, there is no hard evidence to support that.

Sentence

[43] Mr Fatu, please stand:

(a) For supplying methamphetamine, you are sentenced to nine years and five months' imprisonment.

(b) For possession of a precursor substance, you are sentenced to three years' imprisonment.

(c) For participating in an organised criminal group, you are sentenced to five years' imprisonment.

[44] These terms run alongside each other, so your effective sentence is nine years and five months' imprisonment.

[45] Stand down.

Addendum

[46] I asked Ms Hamilton and Mr Lack what suppression orders were necessary, if any, given some of the other defendants are going to trial. They agreed suppression of the alleged involvement of X was all that was necessary.

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Downs J