

CANADA / JUDGMENT

R. v. Kizmann

2023 BCSC 2168

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Supreme Court of British Columbia

DECIDED

17 November 2023

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2023 BCSC 2168 R. v. Kizmann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kizmann,

2023 BCSC 2168

Date: 20231117

Docket: 70169-2

Registry: Chilliwack

Rex

v.

Jeffrey Michael Kizmann

Before: The Honourable Mr. Justice Thomas

Oral Reasons for Sentence

Counsel for the Crown:

F. Lépine

Counsel for the Accused:

S.A.L. Williams

Place and Date of Trial/Hearing:

Chilliwack, B.C.

November 17, 2023

Place and Date of Judgment:

Chilliwack, B.C.

November 17, 2023

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[1] THE COURT: I am ready to provide my reasons on sentencing.

[2] I convicted Mr. Kizmann of the following offences:

Count 1

Jeffrey Michael KIZMANN, on or about the 12th day of April, 2021, at or near the City of Chilliwack, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Carfentanil / Fentanyl / a Benzodiazepine namely etizolam, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 2

Jeffrey Michael KIZMANN, on or about the 12th day of April, 2021, at or near the City of Chilliwack, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Fentanyl / Paraflurofentanyl / a Benzodiazepine namely etizolam, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 3

Jeffrey Michael KIZMANN, on or about the 12th day of April, 2021, at or near the City of Chilliwack, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Carfentanil / Fentanyl, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 4

Jeffrey Michael KIZMANN, on or about the 12th day of April, 2021, at or near the City of Chilliwack, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Fentanyl / a Benzodiazepine namely etizolam, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 5

Jeffrey Michael KIZMANN, on or about the 12th day of April, 2021, at or near the City of Chilliwack, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Fentanyl, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 6

Jeffrey Michael KIZMANN, on or about the 12th day of April, 2021, at or near the City of Chilliwack, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Methamphetamine, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 7

Jeffrey Michael KIZMANN, on or about the 12th day of April, 2021, at or near Chilliwack, in the Province of British Columbia, did have in his possession property, a chain saw, the property of Jeffrey Van Geel, knowing that the said property was obtained by the commission in Canada of an offence punishable by indictment, contrary to Section 355 of the Criminal Code.

[3] My reasons for conviction are set out at R. v. Kizmann, 2023 BCSC 799.

[4] Briefly, on April 12, 2021, I made the following findings:

- 1) While Mr. Kizmann was attempting to sell some stolen chainsaws he was arrested and a fanny pack with a significant amount of drugs were found to be in his possession for purposes of trafficking.
- 2) I enumerated the contents of the fanny pack at paragraph 62 of my reasons. I will not repeat them here.

- 3) I found that the drugs had been appropriately tested and determined the amount of the substances seized from the fanny pack were as follows:
- 114 grams of fentanyl, consisting of 77 grams of carfentanil and 37 grams of fentanyl, with a value ranging from \$12,000 to \$22,840;
 - 29 grams of methamphetamine with a value ranging from \$500 to \$1,740; and
 - 31.5 pills of hydromorphone.
- 4) I received expert evidence from Constable Lewis who opined that:
- a) the methamphetamine seized was possessed for trafficking purposes at a street level for drug users, or at a mid-level of trafficking to other traffickers;
 - b) with respect to the heroin, fentanyl, and carfentanil seized from the fanny pack, this was possessed for trafficking purposes at a mid-trafficking level or had not yet been broken into quantities suitable for trafficking at a street level; and
 - c) the quantities of the other items in the fanny pack were not consistent with possession for personal usage.
- 5) Finally, I concluded as follows:
- [93] In my view, there is significant expert evidence supporting the proposition that Mr. Kizmann was in possession of the substances for purposes of trafficking. Based on this evidence and the pertinent facts summarized earlier, I conclude the Crown has established beyond a reasonable doubt that the substances were in his possession for purposes of trafficking.

Facts in Dispute at this Hearing

- [5] There are several facts under dispute in this sentencing that need to be resolved. When I say facts, what I really mean are inferences to be drawn from agreed facts that I have found; and facts contained in an expert evidence tendered during the sentencing hearing.
- [6] Argument was provided whether the facts could establish inferences beyond a reasonable doubt by the Crown or, if the defence wished to establish a fact, on a balance of probabilities, depending upon whom bore the onus of proof.

First Factual Inference

- [7] The first factual inference in dispute was whether the offender was engaged in street-level trafficking, or mid- or high-level trafficking.
- [8] The offender maintains the position that he had no knowledge of the drugs and that they were not his. Therefore, he has no additional evidence to provide on this issue.

- [9] The inference that I drew at trial was that Mr. Kizmann had knowledge of the drugs in the fanny pack.
- [10] My findings with respect to the expert evidence on the nature of the drugs noted that the quantities and division of the drugs were of amounts consistent for different purposes.
- [11] The heroin/fentanyl/carfentanil were found to be consistent with mid-trafficking levels as the quantities had not yet been broken into small enough portions suitable for trafficking at a street level.
- [12] The methamphetamines were consistent with both street-level and mid-level trafficking in their quantity and division.
- [13] At paragraph 93, I concluded that based on the expert evidence, that Mr. Kizmann was in the possession of the drugs for purposes of trafficking.
- [14] In determining what inferences I can draw in this hearing, I have also considered the expert evidence presented by defence counsel with respect to the differences between mid-level and street-level trafficking.
- [15] When I consider the amount of drugs and the manner in which the drugs and personal drug paraphernalia were organized and stored in the fanny pack, along with the expert evidence, I am satisfied beyond a reasonable doubt it is appropriate to draw the inference that Mr. Kizmann was involved in both street-level and mid-level drug trafficking.
- [16] I say this primarily due to the amount of drugs in his possession and the nature (type of substance, quantity, and division) of the drugs in his fanny pack.
- [17] Counsel argues that there are no associated indicia supporting drug trafficking, such as surveillance evidence or investigations. This is true, but at the time of his arrest Mr. Kizmann was engaged in selling stolen chainsaws the drugs were seized pursuant to that offence. One would not expect surveillance or investigative evidence would exist in the circumstances of his arrest.
- [18] Although I have determined that Mr. Kizmann was involved in mid level trafficking; in my view the inference that can be drawn from the evidence indicates that he lacks sophistication. I would place him at the lower end of the retail or dealer spectrum, but not at the lowest end of the scale. I would characterize him at the lower end of a mid-level trafficking above street-level trafficking: see *R. v. Emery* (1981), 61 C.C.C. (2d) 84, 1981 CanLII 350 (BCCA) which was a case reference that was reviewed by the defence counsel in his submissions.

Second Factual Inference

- [19] Defence counsel says that the Crown has the burden of proving beyond a reasonable doubt that Mr. Kizmann had knowledge that there was carfentanil in the fanny pack, as opposed to fentanyl and/or methamphetamines, or other type of drug, in order for him to be sentenced for trafficking in carfentanil.
- [20] I do not accept this proposition. The Crown has established, beyond a reasonable doubt, that Mr. Kizmann was in possession of the drugs for purposes of trafficking. An inference that Mr. Kizmann was wilfully blind to the nature of the substances, in my view, is established beyond a reasonable doubt.
- [21] I agree with the submissions of the Crown, cases involving trafficking in carfentanil are appropriate to consider for sentencing purposes. The nature and gravity of the offence is trafficking in carfentanil for Counts 1 and 3.
- [22] To be clear, I do not find that Mr. Kizmann had direct knowledge of the carfentanil. If he did have direct knowledge, in my view, this could be an aggravating factor.
- [23] I reject defence counsel's submission that a person trafficking in carfentanil whom is wilfully blind to the nature of the drugs he or she is trafficking should be sentenced as if he or she was trafficking in fentanyl and subject to a sentencing range for that substance, such as the sentencing range set out in *R. v. Cunningham*, 2010 SCC 10.
- [24] Knowledge of carfentanil is not an aggravating factor in this case. However, Mr. Kizmann's willful blindness to the carfentanil is not a mitigating factor.

Sentencing Principles

- [25] In *R. v. Kehoe*, 2023 BCCA 2, our Court of Appeal confirmed the key sentencing principles. Justice Marchand, writing for the court stated:
- [32] The purpose and principles of sentencing were codified in 1996. In striving to protect society and contribute to respect for the law and the maintenance of a just, peaceful and safe society, s. 718 of the Code identifies denunciation, deterrence and rehabilitation, among others, as important sentencing objectives.
- [33] According to s. 718.1, the "fundamental principle" of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [34] Section 718.2 identifies a number of other important principles. Under s. 718.2(a), a sentence must be increased or reduced to account for any relevant aggravating or mitigating circumstances. Under s. 718.2(b), similar sentences should be imposed for similar offences committed in similar circumstances by similar offenders. Sections 718.2(c), (d) and (e) promote restraint in sentencing.

Application of the Sentencing Principles

Mitigating Factors

- [26] Mr. Kizmann had a difficult childhood, being introduced to illegal activity, alcohol, and marihuana at seven years old. He spent much of his childhood in group homes and living on the streets. He began using harder drugs, such as cocaine, opiates, and methamphetamine at age 15. He struggles with addiction to these drugs to this day. In my view, his childhood clearly has had a bearing on the trajectory of his life.
- [27] The Crown says that Mr. Kizmann is now 41 years old, so his experiences as a child and growing up should be less of a mitigating factor than it would be for an offender in early adulthood or even in his thirties. I disagree.
- [28] In this case, in my view, Mr. Kizmann has not been able to break out of his pattern of addiction, poverty, and other life circumstances. In this sense, I am of the view that his circumstances, starting from a very early age, which have continued to present, are a mitigating factor and I find them to be significant.

Aggravating Factors

- [29] The Crown argues that the main aggravating factor in this case is the type and quantity of carfentanil Mr. Kizmann was trafficking in. This is a very significant factor.
- [30] I agree this is an important consideration but I do not accept that it is an aggravating factor in the sense that one should consider a firmer sentence. In my view, this is a factor that is pertinent to the gravity of the offence such that I should refer to sentences dealing with trafficking in carfentanil as setting comparable range of sentences. This is to be distinguished from an aggravating factor consisting of direct knowledge by an offender that he or she was trafficking in substances that are very dangerous.
- [31] The Crown argues Mr. Kizmann's lengthy criminal record is an aggravating factor. I agree. It must be recognized that he has two previous trafficking convictions; however, the last conviction for trafficking was 10 years ago and neither of the convictions are anywhere near as serious as this.
- [32] Therefore, I do not find this to be nearly as aggravating a factor as suggested by the Crown, given the relatively weak connection between the two previous trafficking convictions and this offence, which I find to be much more significant.

Deterrence, Denunciation, and Public Protection

- [33] The principles of deterrence and denunciation, along with the need for public protection are of paramount importance in this situation. It is important for this court, through the sentencing process, to denounce Mr. Kizmann's conduct in the trafficking of carfentanil. The sentence I impose today must serve to communicate society's condemnation of trafficking in carfentanil and recognize the devastating harm this causes to the community. The aim of general deterrence is to ensure that those like Mr. Kizmann who engage in trafficking in

carfentanil come to understand that this will not be tolerated. They must understand that the penalties for such egregious behaviour will be severe.

- [34] A fit and proper sentence must be reflective of and responsive to the local conditions in this province; namely the severe and ongoing opioid epidemic we currently face.
- [35] The aim of specific deterrence to Mr. Kizmann is a significant consideration as well. This is not the first time he has been involved in trafficking and for the last 26 years, I accept the Crown's characterization of his record, has engaged in almost an uninterrupted crime spree of relatively minor offences.
- [36] Mr. Kizmann must come to realize that there are consequences for his actions, especially with respect to trafficking in carfentanil.
- [37] In this case, protection of the public demands that Mr. Kizmann be separated from society. Mr. Kizmann's presence in society is a risk to the public through both the gravity of this offence and his ongoing prolonged disregard for the law.

Rehabilitation

- [38] While deterrence and denunciation are of paramount importance, I must also consider the principle of rehabilitation. The prospect of rehabilitation cannot be overlooked when crafting an appropriate sentence, but it is of secondary importance when dealing with the type of case before me. As Justice Ker noted in *R. v. Friesen*, 2019 BCSC 1038:
- ... the importance of rehabilitation will vary from case to case, depending on the degree of willingness of the offender to turn things around and the degree of confidence that the court has in the durability of the offender's recovery.
- [39] The presentencing report indicates that Mr. Kizmann has had minimal engagement with counselling, but would acquiesce to a trauma counsellor if specifically directed to do so, and views treatment and substance abuse programs as a waste of time.
- [40] Having said that, since being in custody since his arrest, he has committed himself to a methadone program. He has also engaged in some counselling at different times during his incarcerations. Finally, he has a stable environment and support of Ms. H., who could provide some stability upon his release through the form of a place to live and perhaps even employment.
- [41] In this case, I have little confidence that Mr. Kizmann is willing to turn things around, nor do I have much confidence in reformation. I see no signs of desire to change his pattern of behaviour. Although skeptical, I recognize that there is, in this case, a clear opportunity for rehabilitation largely arising from the support of Ms. H.

Appropriate Sentencing Range

- [42] The Crown says that the range of sentence for carfentanil cases are appropriate, and that the range starts at nine years and goes upwards from there. In oral submissions, he lowered this range to beginning at seven to eight years.
- [43] In considering the issues arising from and associated with carfentanil, in particular, the facts led by the Crown in this hearing, there is no question that the moral culpability of offenders who traffic in carfentanil is very high. Our court has clearly recognized that general deterrence and denunciation must feature prominently in this situation in light of the serious unabated health crisis caused by the sale of these drugs. It is accepted that carfentanil is much worse than fentanyl and carries with it a higher range of sentences for parity purposes.
- [44] I agree with the Crown that it is difficult to reconcile all the sentencing cases with respect to the quantity of the controlled substance, carfentanil, involved in all of the cases referred to in his brief.
- [45] However, the cases that the Crown bases their range on have two significant difficulties:
- 1) I have determined that Mr. Kizmann is an unsophisticated trafficker. I note Justice Ker's comments in *R. v. Toth*, 2017 BCSC 501 that the sophistication of an enterprise is critical when considering the appropriate sentence. She observed at para. 82, there is a broad spectrum of trafficking activities, ranging from the less sophisticated and isolated, to persistent, sophisticated and serious. She said that where a particular offence is situated on that spectrum will substantially impact how the court will decide an appropriate sentence. This was also echoed again by defence counsel in the cases he referred to of *R. v. Goodkey*, 2015 BCCA 64 and *R. v. Sammy*, 2004 ONCJ 32.
 - 2) The offences relied upon by the Crown by and large were all associated with guns or weapons.
- [46] In my view, the Crown has overstated the range of cases that apply to Mr. Kizmann's circumstances by placing a central and overwhelming focus solely on the amount of carfentanil to the exclusion, in my view, of other factors.
- [47] Defence counsel says the appropriate range of sentencing would be for street-level trafficking, which would be between 18 to 36 months; whereas the appropriate range for mid-level trafficking starts at 30 months and can extend to as high as 10 years.
- [48] I have already indicated that this range does not account for the fact that this offence involves carfentanil and therefore is of limited assistance.

Position of Offender

[49] Defence counsel says an appropriate sentence would be time served. He argues that the offences before the court fall to the lower end of the scale in terms of both gravity of the offence and his corresponding culpability. He notes the following:

- 1) Mr. Kizmann was arrested during the sale of stolen property in circumstances consistent with unsophisticated street crime, as opposed to more serious criminality.
- 2) Although Mr. Kizmann was found to be in possession of drugs for the purpose of trafficking, there was no evidence related to a scope or nature of trafficking that would support a sophisticated enterprise.
- 3) By all indications, this was an unsophisticated offence.
- 4) Given the lack of direct knowledge of carfentanil, it would be more appropriate to base a sentencing range as a starting point based on the fentanyl cases.

[50] I cannot accept defence counsel's submissions. I say this because:

- 1) I do not believe it is appropriate to ignore the element of carfentanil in the sentencing cases. I agree with defence counsel that carfentanil should not be an aggravating factor, because I have not found direct knowledge of the carfentanil by Mr. Kizmann, but only that he was wilfully blind to it. However, I do think using carfentanil cases are appropriate because they go to the gravity of the offence and therefore set a useful range to begin the sentencing process; In addition, although
- 2) I have found that Mr. Kizmann is unsophisticated, the level of activity he has been convicted of is above mere street trafficking, even though it is at the low level of the range.

Position of the Crown

[51] The Crown says that sentences imposed should all be concurrent to one another. Counts 1 and 3 are the most serious as they involve carfentanil. The Crown suggests 10 years on those two counts, six years on Counts 2, 4, and 5, three years on Count 6, and six months on Count 7.

[52] The Crown notes trafficking in carfentanil and fentanyl are very serious matters given the carnage and devastation those drugs cause in our province. Methamphetamine does not kill as many people, but methamphetamine users are not known for their prosocial, positive contributions to society. The life of the meth addict is not a happy one.

- [53] He notes while deterrence and denunciation are the most significant considerations in this matter, the court must of course not lose track of the offender's prospects for rehabilitation. In the case at bar, sadly Mr. Kizmann has not given the court much to consider. That leaves the seriousness of the offence before the court as the main and almost only consideration in this hearing. The trafficking of carfentanil is still a relevant recent phenomenon. Sentence ranges are still being formulated.
- [54] In the Crown's respectful view, the range for trafficking in carfentanil in the quantity Mr. Kizmann had and in the role in which he was involved starts at least just shy of 10 years in the high digits of federal time.
- [55] Mr. Kizmann's criminal record warrants a global sentence of 10 years, in the Crown's respective view.
- [56] As noted, I am concerned that the cases relied upon by the Crown to set the ranges of cases involve more sophisticated traffickers, trafficking enterprises, and also the use of guns and/or weapons. None of these factors are present here or applicable to Mr. Kizmann's circumstances.
- [57] Although I did indicate that I was skeptical with respect to rehabilitation, I do believe that there is a possibility of hope particularly with respect to the environment that could be provided by Ms. H. Therefore, in that sense, I do not find that I am as negative as the Crown with respect to the rehabilitation.

Determination of Appropriate Range of Sentences

- [58] I found the case of *R. v. Kazakoff*, 2022 BCSC 2151, referred to by the Crown in his brief and at length by defence counsel, to be very helpful. In my view, this case and the cases referred to by Justice Kirchner at paras. 62-67 provide useful guidance to an appropriate range of sentence in these circumstances.
- [59] Kazakoff has many similar factors to this case. Justice Kirchner considered the issue of Mr. Kazakoff's troubled upbringing and life, which have many parallels here. He was convicted of trafficking 111.76 grams of fentanyl and 21.22 grams of carfentanil and 11 grams of methamphetamine. Although the amounts of carfentanil and fentanyl involved here are almost reversed to Mr. Kizmann's detriment, there were indications that Mr. Kazakoff was engaged in a slightly more sophisticated level of trafficking and more of an enterprise than the findings that have been made here based on the factual inferences I drew. I note that despite some evidence of enterprise and sophistication, Kirchner J. did conclude that it was a relatively unsophisticated operation and at a low level.
- [60] Justice Kirchner sentenced Mr. Kazakoff to six years for the carfentanil trafficking, but reduced it to five years because of concurrent sentencing to related but separate charges under the totality principle.

- [61] I am of the view that Kazakoff and the cases discussed therein apply a useful range for Mr. Kizmann's circumstances.
- [62] I have set out at length the individual factors that I believe are appropriate, in addition to the range of sentence, to craft an appropriate sentence for Mr. Kizmann.

Proportionality and Parity of Sentence

- [63] As stated earlier, the fundamental principle of sentencing, proportionality, requires Mr. Kizmann's sentence to be proportionate to the gravity of the offence and his degree of responsibility. Additionally, pursuant to the principle of parity, the sentence imposed should be similar to sentences imposed on similar offenders for similar offences in similar circumstances.
- [64] As discussed by the court in *R. v. Parranto*, 2021 SCC 46, I am mindful that sentencing ranges are merely suggestions or guidelines, and my task as a sentencing judge is to craft an appropriate sentence for this particular offender with regard to the circumstances, both of the offender and the offence, together with the principles of sentence I referred to earlier.
- [65] I have found the sentencing decision of Kazakoff to be of particular assistance in determining the appropriate sentence for Mr. Kizmann. I have also considered the developments in the jurisprudence related to the sentencing of carfentanil and fentanyl traffickers, and guidance from the Supreme Court of Canada in *Parranto*, and guidance from our Court of Appeal in *R. v. Smith*, 2017 BCCA 112 and subsequent cases.
- [66] The prevailing message from all these cases is that those who engage in the distribution of carfentanil will be subject to severe sanctions.

Sentence

- [67] For those reasons, and again having regard to the mitigating factors I have discussed, in my view a term of incarceration of six years is appropriate, having regard to the moral blameworthiness and the mitigating factors.
- [68] I would therefore sentence Mr. Kizmann to six years for the present offences, broken down as follows: six years for Count 1 and 3; two years for Counts 2, 4, and 5; one and a half years for Count 6, all to be served concurrently. With respect to Count 7, I assess this at three months to be served consecutively to the trafficking charges, which I find to be essentially unrelated.
- [69] I have reviewed this sentence and considered and applied the principle of proportionality and parity to this sentence, and I am of the view that six years is an appropriate total sentence, and therefore order that Count 7 also be served concurrently.
- [70] Mr. Kizmann is to be credited for three years, 11 months, and 15 days for time served in custody, for a total remaining time of two years and 15 days.

- [71] Mr. Kizmann, could you please stand. For the reasons I have just given, I sentence you to six years for Counts 1 and 3; two years for Counts 2, 4, and 5; one and a half years for Count 6; and three months for Count 7. All are to be served concurrently.
- [72] You are credited with three years, 11 months, and 15 days for time served in custody. Total remaining sentence of two years and 15 days.
- [73] I waive the victim surcharge, and I am not willing to grant the s. 109(3), as I have been provided no argument to exercise my discretion to do so.
- [74] You may sit down. Is there anything further from Crown or defence?
- [75] CNSL F. LEPINE: I'm not aware of anything to -- that would be forfeited and while I don't know if it falls into the same category in terms of the DNA order, I have not made submissions on DNA. These are secondary designated offences.
- [76] THE COURT: I understand I have the discretion to do it.
- [77] CNSL F. LEPINE: Yes.
- [78] THE COURT: I just do not see any reason as to why I would in these circumstances.
- [79] CNSL F. LEPINE: Okay, no, I understand, so the one ancillary -- there would be no ancillary orders.
- [80] CNSL F. LEPINE: Was the court inviting me to make submissions?
- [81] THE COURT: Do you intend to make some submissions with respect to that? I do not recall any submissions being made on this point.
- [82] CNSL F. LEPINE: Okay.
- [83] THE COURT: Do you wish to make some submissions on the ancillary orders?
- [84] CNSL F. LEPINE: No, thank you.
- [85] THE COURT: So I think that then is all we can deal with today.
- [86] CNSL F. LEPINE: Yes, there's nothing to be stayed so yeah, I think that is all. Thank you.
- [87] THE COURT: I would like to thank both counsel for their helpful submissions.
- [88] THE CLERK: So just to confirm, it's just jail, straight jail, and victim surcharge exempt?
- [89] THE COURT: Yes.
- [90] THE CLERK: Okay, and the credit goes to the six-year?
- [91] THE COURT: Yes, to both Count 1 and 3 because they are concurrent and extend beyond the length of the credit.
- [92] THE CLERK: Just to Count 1 and 3, the credit.

[93] THE COURT: Yes.

[94] THE CLERK: Okay.

[95] THE COURT: The parties have leave to make submissions on that issue if necessary.

"Thomas J."

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Prepared on 27 October 2026 · Esheria