

Retained Jurisdiction Disposition and Notice of Right to Appeal, p. 2.

On December 7, 2011, Brune filed the instant "Motion to Reconsider Retained Jurisdiction Disposition and IRC [sic] 35 Motion". In that motion Brune requests the Court "...reconsider its disposition filed November 23, 2011, and place defendant on probation..." Motion to Reconsider Retained Jurisdiction Disposition and IRC 35 Motion, p. 1. Alternatively, Brune requests the Court reconsider its comments on page 2 of the November 22, 2011, Retained Jurisdiction Disposition and Notice of Right to Appeal. Motion to Reconsider Retained Jurisdiction Disposition and IRC 35 Motion, p. 2. Those comments Brune finds objectionable are 1) describing Brune's behavior as "anti-social", 2) describing Brune as a "high risk to reoffend" sexually, and 3) recommendations to the State of Idaho Parole Commission are a violation of the separation of powers.

A motion to modify a sentence pursuant to I.C.R. 35 "shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion." I.C.R. 35; see *State v. Copenhagen*, 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James*, 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct.App. 1986) (it is the defendant's burden to present any additional evidence and the court cannot abuse its discretion in "...unduly limiting the information considered in deciding a Rule 35 motion"); *State v. Puga*, 114 Idaho 117, 118, 753 P.2d 1263, 1264 (Ct.App. 1987). Even though a hearing was requested by Brune in his Motion to Reconsider Retained Jurisdiction Disposition and IRC [I.C.R.] 35 Motion, "[t]he decision whether to conduct a hearing on an I.C.R. 35 motion to reduce a legally-imposed sentence is directed to the sound discretion of the district court." *State v. Peterson*, 126 Idaho 522, 525, 887 P.2d 67, 70 (Ct.App. 1994); citing *State v. Findeisen*, 119 Idaho 903, 811 P.2d 513 (Ct.App. 1991). The Court has reviewed the Motion for

Reconsideration of Sentence Pursuant to I.C.R. 35, its Retained Jurisdiction Disposition and Notice of Right to Appeal, the Court minutes from the November 22, 2011, hearing, and the pre-sentence report and the Addendum to the Presentence Report (which recommended relinquishment of jurisdiction). There is nothing that could be presented at a hearing that would be of benefit to the Court. A hearing would only waste counsel and the Court's time.

A motion to reduce sentence is a motion for leniency. *State v. Strand*, 137 Idaho 457, 463, 50 P.3d 472, 478 (2002); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). The decision to grant or deny leniency is left to the sound discretion of the court. *Id, Strand*; *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct.App. 1989)

A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court. *State v. Arambula*, 97 Idaho 627, 550 P.2d 130 (1976). Such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe. *State v. Lopez*. 106 Idaho 447, 680 P.2d 869 (Ct.App. 1984).

* * *

However, if the sentence is not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion.

State v. Forde, 113 Idaho 21, 22, 740 P.2d 63 (Ct. App. 1987). *See also State v. Adams*, 137 Idaho 275, 278, 47 P.3d 778, 781 (Ct.App. 2002).

For a sentence to be considered "reasonable" at the time of sentencing the court must consider the objectives of sentencing: whether confinement is necessary to accomplish the objective of protection of society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to the case. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct.App. 1982). This requires the court focus on "...the nature of the offense, the character of the offender, and the protection of the public interest." *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct.App. 1982).

The sentence imposed on February 1, 2011, was and is an appropriate sentence

given Brune's social and criminal history and the crime for which sentence was imposed. The imposition of that sentence on November 22, 2011, is an appropriate decision based on Brune's performance on his period of retained jurisdiction. A lesser sentence would depreciate the seriousness of Brune's crimes, and probation, as Brune now requests, would impermissibly disregard the need to protect society. This Court concludes that the sentence imposed and the decision to relinquish jurisdiction was and is necessary for the protection of society and the deterrence of Brune and others.

Finally, both the motion to reconsider and any objections made by Brune are not permissible procedurally. There is no rule basis for a "motion to reconsider" a criminal order or judgment. The only mechanism available to Brune is a motion pursuant to I.C.R. 35. Under I.C.R. 35, the court may correct a sentence, but Brune is not asking this Court to reconsider its sentence. Instead, Brune asks this Court to reconsider its decision to send Brune to prison. Since there is no motion to reconsider anything other than the sentence contemplated by the Idaho Criminal Rules, and reconsidering its decision to send Brune to prison is not contemplated as a reviewable action under I.C.R. 35, Brune's motion is simply not allowed. For the same reasons, Brune's "objections" are not allowed.

Even if there were a procedural mechanism to deal with Brune's objections, Brune's objections are without merit. First, Brune objects to the Court describing Brune's behavior as "anti-social" when Brune "...has never been diagnosed as anti-social." This objection is without merit as the Court did not say he was diagnosed as anti-social, this Court did not diagnose Brune as anti-social, this Court simply stated Brune's behaviors were anti-social. That conclusion is certainly borne out by Brune's conduct while in prison on his retained jurisdiction. Second, Brune objects to the Court describing Brune as a "high risk to reoffend" sexually. As set forth above, the quoted portion of this Court's Order reads: "(his first APSI categorizes him as a high risk to reoffend sexually per the

STATIC 99 and STABLE 2007)". Retained Jurisdiction Disposition and Notice of Right to Appeal, p. 2. A review of Brune's first APSI shows a Sex Offender Risk Assessment is attached which notes that Brune's STABLE-2007 scores "...indicates he falls into the High risk category" and his Static 99 scores indicate "...the Low-Moderate range to reoffend." July 8, 2011, APSI, Sex Offender Risk Assessment, pp. 2-3. Thus, one instrument assessed Brune as a high risk to reoffend, the other a low-moderate. For purposes of the order, the Court erred on the side of the higher assessment. The State of Idaho Department of Correction administered these tests and gave these results to counsel and the Court. The Court is certain that the State of Idaho Department of Correction will evaluate and place Brune in the appropriate level of treatment to correctly correspond with his assessed risk to reoffend. Third, Brune objects to the Court in its order recommending to the State of Idaho Commission of Pardons and Parole, that Brune should not be considered for parole until his risk to reoffend and his anti-social behaviors have been addressed. Brune claims such is a violation of the separation of powers. The language used by the Court is simply a "recommendation" to the State of Idaho Parole Commission, and is denoted as such. This Court did not "order" the Parole Commission to take any action, and this Court certainly realizes it lacks the jurisdiction to make any such order. The language used by this Court in Brune's order is consistent with nearly every order by this Court over the past ten years in which the Court has relinquished jurisdiction on a defendant due to the defendant's poor performance while on a period of retained jurisdiction. The recommendation is made in these cases (and in Brune's case) because the Court feels the programming recommended by the Court at the inception of the period of retained jurisdiction was important. If the defendant in these cases (and in Brune's case), due to his or her poor performance on the retained jurisdiction, was not able to get that needed programming, this Court feels it is important

for that defendant (and for Brune) to get that programming while serving his prison sentence. The temptation may be very real for the defendant in these cases (and for Brune) to simply feel he or she can simply serve his or her fixed sentence, then obtain the privilege of parole without ever trying (or even refusing) to get that needed treatment in prison. By adding this language, the Court is 1) making clear to the Parole Commission what this Court feels is needed to protect the public and rehabilitate Brune, and 2) warning Brune that should he decide to make the decision to not seek or worse yet, refuse the treatment the Court feels he needs, that such decision may be ill founded and work out very badly for Brune by his possibly serving the indeterminate years of his sentence as well. There is no separation of powers issue created by such recommendation.

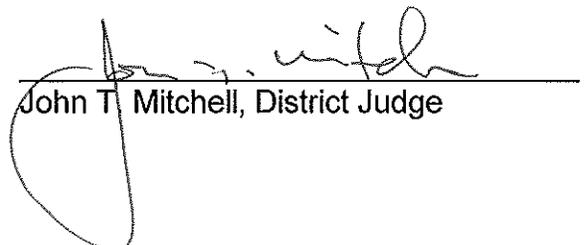
IT IS THEREFORE ORDERED that Brune's I.C.R. 35 Motion is **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, ALEXANDER VINCENT BRUNE, ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an appeal, you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer, if any.

DATED this 8th day of February, 2012.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 9 day of February, 2012 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - James E. Siebe *FXcd*
Prosecuting Attorney - *446-1833*

ALEXANDER VINCENT BRUNE
IDOC # 98970

Idaho Department of Correction
Records Division (certified copy)
Fax: (208) 327-7445 ✓

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

#44688

BY: *Jenna Clausen*, Deputy