STATE OF IDAHO)
County of KOOTENAI) ss
FILED 3/28/12
AT 5:00 O'clock P. M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

NICHOLAS SHAWN FAGERLAND

Defendant.

Case No. **CRF 2005 4496**
CRF 2005 13098

ORDER DENYING DEFENDANT FAGERLAND'S DECEMBER 8, 2011, "MOTION FOR RECONSIDERATION OF SENTENCE PURSUANT TO I.C.R. 35" AND NOTICE OF RIGHT TO APPEAL

I. PROCEDURAL HISTORY AND BACKGROUND.

In both of the above captioned cases, on December 8, 2011, Fagerland filed a Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, requesting "...the Court to reconsider the Judgment and Sentence entered herein November 28, 2011." December 8, 2011, Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, p. 1. Fagerland bases this motion on "...a plea for leniency." *Id.* That is the sum total of Fagerland's motions. No additional reason, new information, new facts or new argument is given by counsel for Fagerland in the new motion filed in either case.

It is quite common for the Office of the Kootenai County Public Defender to file I.C.R. 35 Motions which state absolutely no factual basis for the motion. Such cryptic motions have become the norm. Indeed, this Court cannot recall the last motion that set forth *any* factual basis or new information. Due to the frequency of such motions, unless a factual basis for the motion is given in the future, this Court will dismiss these motions

without a hearing (*State v. Peterson,* 126 Idaho 522, 525, 887 P.2d 67, 70 (Ct.App. 1994)), and without entering findings. This Court finds such is allowed under I.C.R. 35 and I.C.R. 2(a) and pursuant to *State v. Parrish,*110 Idaho 599, 601, n. 1, 716 P.2d 1371, 1373, n. 1 (Ct.App.,1986). "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay." *Id.* The trial court is not required to enter findings in support of its decision on a Rule 35 motion. *State v. Ojeda,* 119 Idaho 862, 867, 810 P.2d 1148, 1153 (Ct.App. 1993); *State v. Thomas,* 112 Idaho 1134, 1136, 739 P.2d 433, 435 (Ct.App. 1987). Because no hearing is required, the Court may then find itself constrained to what is set forth in the pleadings, in these cases, simply the motion itself. Thus, "no recognizable new information" is presented to the court. *State v. Howard,* 112 Idaho 1132, 1133, 739 P.2d 431, 432 (Ct.App. 1987). No new or additional information was presented in these two motions brought by Fagerland, nor has there been new or additional information in the myriad of other Rule 35 Motions presented to this Court over the past decade by the Office of the Kootenai County Public Defender. *Id., see also State v. Jafek,* 141 Idaho 71, 75, 106 P.3d 397, 402 (2005); *State v. Shumway,* 144 Idaho 580, 583, 165 P.3d 294, 297 (Ct.App. 2007).

While it is an abuse of discretion for the judge to unduly limit the information considered in deciding a Rule 35 Motion (*State v. Hoffman,* 112 Idaho 114, 115, 730 P.2d 1034 (Ct.App. 1986), *citing State v. Torres,* 107 Idaho 895, 693 P.2d 1097 (Ct.App. 1984)), it is clearly up to the defendant to present the information. *Id.* "If there had been additional information to support his case, it was up to Hoffman to present it first to the district court and second to the appellate court." *Id., citing State v. Rundle,*

107 Idaho 936, 694 P.2d 400 (Ct.App. 1984). If the defendant fails to make the showing of new or additional information, it is within the sentencing judge's discretion to deny the I.C.R. 35 Motion. *State v. Ojeda,* 119 Idaho 862, 867, 810 P.2d 1148, 1153 (Ct.App. 1993), *citing State v. Morrison,* 119 Idaho 229, 804 P.2d 1360 (Ct.App. 1991) In *Torres,* the Idaho Court of Appeals found the sentencing judge unduly limited the information he considered on an I.C.R. 35 Motion when he sustained the prosecutor's hearsay objection to a report by an Idaho Board of Correction social worker. 107 Idaho 895, 898, 693 P.2d 1097, 1100. The Idaho Court of Appeals noted strict evidentiary rules are not rigidly applied in sentencing proceedings or in Rule 35 proceedings. *Id.* While *Torres* stands for the proposition that the sentencing judge cannot unduly limit, it was ***new*** information being ***presented*** *by the defendant* in *Torres* which the Idaho Court of Appeals found was errantly excluded. In situations such as Fagerland's two instant motions, there is no new information being presented.

In the future, if an attorney for the defendant is going to insist on not providing any basis to show a cause for leniency, this Court will exercise its discretion and find no cause for leniency exists. *State v. Russell,* 109 Idaho 723, 724, 710 P.2d 633, 634 (Ct.App. 1985); *State v. Forde,* 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct.App. 1987). The Idaho Supreme Court affirmed the sentencing judge's denial of Farwell's I.C.R. 35 motion, "...because Farwell failed to support his [I.C.R. 35] motion with any new or additional information showing the sentence to be excessive." *State v. Farwell,* 144 Idaho 732, 736-37, 170 P.3d 397, 401-02 (2007). If a 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 for reduction of sentence. *State v. Caldwell,* 119 Idaho 281, 288, 805 P.2d 487, 494 (Ct.App. 1991).

The Court appreciates that in cases such as Fagerland's, it is ordinarily the defendant who asks defense counsel to file the I.C.R. 35 Motion. This Court appreciates defense counsel may be concerned that if the client requests an I.C.R. 35 Motion be filed, defense counsel's failure file such may result in a later claim for ineffective assistance of counsel in a post-conviction relief case, under I.C. § 19-4901 *et. seq.* Certainly such a claim would be proper. *Murray v. State,* 121 Idaho 918, 828 P.2d 1323 (Ct.App. 1992). However, if the defendant client has no new information, then the I.C.R. 35 motion would be baseless. Nothing requires defense counsel to file baseless I.C.R.35 motions. While any defendant can file a claim for post-conviction relief, that post-conviction claim would in turn also be baseless if it were based upon defense counsel's failure to file a baseless I.C.R. 35 motion. What would be a *valid* "ineffective assistance of counsel claim" would be where a defendant has a well-founded I.C.R. 35 motion based on new information, but defense counsel fails to provide any new information along with the motion. It is simply unacceptable that the district judges in the First Judicial District repeatedly face cases such as Fagerland's, where the I.C.R. 35 Motion is apparently filed merely to appease the defendant, when no new information is presented. Additionally, such a motion violates Idaho Rules of Professional Conduct 3.1 regarding "meritorious claims and contentions."

Fagerland requested a hearing on his I.C.R. 35 Motion. *Id.* A motion to modify a sentence "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. Copenhaven,* 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, "[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, and finds, for the reasons set forth below, there is absolutely nothing that could be presented by Fagerland at a hearing which would be of benefit to the Court. A hearing would only waste counsel and the Court's time.

II. ANALYSIS.

A. FAGERLAND'S MOTIONS ARE ILLEGAL.

Fagerland's motions, filed on December 8, 2011, in both cases, are not allowed under Idaho law. This is Fagerland's second I.C.R. 35 Motion. On March 8, 2010, again in both cases, Fagerland filed a Motion for Reconsideration of Sentence Pursuant to I.C.R. 35. On March 15, 2010, in both cases, this Court, without a hearing, entered its Order Denying I.C.R. 35 Motion and Notice of Right to Appeal. That opinion is set forth *infra*, in its entirety.

Idaho Criminal Rule 35(b) ends with the following phrase: "...provided, however that no defendant may file more than one motion seeking a reduction of a sentence under this Rule." In 1996, not surprisingly, the Idaho Court of Appeals quoted an Idaho Supreme Court decision from 1994, where the Idaho Supreme Court interpreted its I.C.R 35 to mean exactly what it says: "The rule clearly prohibits the filing of more than one motion for reduction of sentence." *State v. Heyrend,* 129 Idaho 568, 572, 929 P.2d 744,

748 (Ct.App. 1996), *citing State v. Wersland,* 125 Idaho 499, 504-05, 873 P.2d 144, 149-50. *See also State v. Payan,* 132 Idaho 614, 619, 977 P.2d 228, 233 (Ct.App.1998). The Idaho Supreme Court has held *res judicata* also prevents a defendant in Fagerland's position from relitigating issues previously decided by this Court. *State v. Rhoades*, 134 Idaho 862, 863, 11 P.3d 481, 482 (2000).

B. FAGERLAND'S MOTIONS ARE UNTIMELY.

Fagerland filed these motions on December 7, 2011. Fagerland is **nearly six years untimely**. As set forth in the earlier decision below, the first sentence was imposed on Fagerland on August 23, 2005; the second sentence was imposed on Fagerland a week later on August 31, 2005. Those sentences are within the range of lawful sentences for the crimes for which those sentences were imposed. Fagerland has failed to even suggest any basis for determining that the imposed sentences are illegal sentences. Since they are legal sentences, under I.C.R. 35, the 120 day time period applies.

Under the facts of this case, the last day Fagerland could have filed an I.C.R. 35 motion in this action was 120 days after August 31, 2005, which would have been December 29, 2005. This court is without jurisdiction to grant leniency under I.C.R. 35. *See State v. Sutton,* 113 Idaho 832, 748 P.2d 416 (Ct. App. 1988); *State v. Payan,* 132 Idaho 614, 619, 977 P.2d 228, 233 (Ct.App.1998).

C. FAGERLAND'S MOTIONS LACK ANY FACTUAL BASIS.

The following shows the absolute factual absurdity in Fagerland's current motions. Since the time that Fagerland filed his first Motions for Reconsideration of Sentence Pursuant to I.C.R. 35 in both cases and this Court filed its March 15, 2010, Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, in both cases, the following have occurred

at the hands of Fagerland. This Court fully appreciates the fact engaging in the following discussion amounts to harmless error (*State v. Payan,* 132 Idaho 614, 619, 977 P.2d 228, 233 (Ct.App.1998)), given the fact that Fagerland's motions are dismissed as they are successive motions and are dismissed due to the lack of jurisdiction caused by Fagerland's untimely filing of the motions. The Court only engages in the following discussion to illustrate the pointless work created upon the courts when counsel for a defendant simply files an I.C.R. 35 Motion without setting forth any factual basis for the motion.

On August 5, 2010, Fagerland returned from his FOURTH retained jurisdiction. At that time, this Court placed Fagerland back on probation. Within six days, Fagerland violated his probation by avoiding supervision. On August 11, 2010, Fagerland was taken from the Good Samaritan Rehabilitation Program, by Good Samaritan Staff, to IDOC to attend his probation orientation. After attending that orientation, Fagerland left IDOC and his ride back to Good Samaritan was unable to find Fagerland. This Court issued a Bench Warrant on August 16, 2010, and on August 31, 2010, Fagerland was arrested on that warrant. On September 10, 2010, the Court again released Fagerland back to Good Samaritan but scheduled an order to show cause hearing on why Fagerland's probation should not be violated, for September 14, 2010. Fagerland attended the hearing, and this Court continued Fagerland's probation but set another hearing for November 17, 2010, to see if Fagerland could complete the Good Samaritan Program. On October 5, 2010, Fagerland walked away from the Good Samaritan program and absconded from probation. A Bench Warrant was issued the same day, and on October 7, 2010, Fagerland was arrested. On November 23, 2010, this Court sent Fagerland on his FIFTH retained jurisdiction, specifically recommending the Therapeutic Community option. This option was not available through IDOC on Fagerland's prior four retained jurisdictions.

On September 29, 2011, Fagerland returned from his Therapeutic Community retained jurisdiction, and this Court again placed Fagerland on probation. Twenty-four days later Fagerland violated his probation by committing an unlawful entry and using methamphetamine, and by failing to show up for three random drug tests. On November 28, 2011, this Court sent Fagerland to prison, giving him credit for 1,457 days time served in CRF 2005 4496 and 1,432 days credit for time served in CRF 2005 13098. Thus, given Fagerland's concurrent sentences of which the maximum was three years fixed, Fagerland was "parole eligible" the day he left court on November 28, 2011.

The March 15, 2010, Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, demonstrates the abysmal failure Fagerland accomplished on probation in the five previous years:

> **I. PROCEDURAL HISTORY.**
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> On August 23, 2005, Fagerland, was sentenced as follows: CRF 2005 4496 - POSSESSION OF A CONTROLLED SUBSTANCE - MEHTAMPHETAMINE, (a felony), Idaho Code § 37-2732(c), committed on March 4, 2005 – to the custody of the Idaho State Board of Correction for a fixed term of TWO (2) years followed by an indeterminate term of THREE (3) years, for a total term not to exceed FIVE (5) years.
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> It is important to note that in the five months between the March 4, 2005, arrest for possessing methamphetamine, and August 23, 2005, Fagerland was in the Kootenai County Drug Court. Due to his failure to stay free from controlled substances in that program, his probation was revoked and he was sentenced on August 23, 2005.
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> Fagerland's termination from the Kootenai County Drug Court was also due to the filing of new charges on July 1, 2005, in Kootenai County Case No. CRF 2005 13098, a forgery charge for events that occurred between April 1, 2005, and May 12, 2005. A week after his sentencing on the above methamphetamine charge, on August 31, 2005, Fagerland was sentenced as follows:
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> **CRF 2005 13098 - FORGERY** Idaho Code § 18-3601, committed on April 1, 2005 – May 12, 2005 – to the custody of the Idaho State Board of Correction for a fixed term of THREE (3) years followed by an indeterminate term of FIVE (5) years, for a total term not to exceed EIGHT (8) years.
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> The Court ordered the two sentences run concurrent. On August 31, 2005, this Court sent Fagerland on his first period of retained jurisdiction, for both

charges in both cases. On February 22, 2006, this Court placed Fagerland back on probation. Later, additional probation violations occurred, and as a result of those probation violations on two more separate occasions, Fagerland was sent on two more retained jurisdiction programs.

On February 22, 2010, as a result of yet another probation violation, this one dated November 16, 2009, this Court revoked Fagerland's probation and imposed the sentences as set forth above. This Court sent Fagerland to prison, but retained jurisdiction, recommending that Fagerland take the highest level of "A New Direction" (the prison based chemical dependency program), since Fagerland still struggles with his addiction. Fagerland will have an opportunity in August, 2010, to convince this Court that the Court should place Fagerland back on probation. This is the FOURTH retained jurisdiction program ordered by this Court of Fagerland. At that hearing on February 22, 2010, this Court gave Fagerland credit for 885 days time served on the sentence imposed in CRF 2005 4496, and 859 days time served in CRF 2005 13098. This Court is quite confident that this is the most amount of time spent in custody by any defendant, where on a subsequent probation violation, this Court has chosen to retain jurisdiction rather than simply relinquish jurisdiction and have the defendant serve out the rest of his prison sentence in prison. In other words, this Court has absolutely bent over backwards giving Fagerland yet another opportunity to better himself and keep himself out of serving the remainder of his prison sentence in prison. Apparently that is not enough for Fagerland, as the filing of his I.C.R. 35 motion would indicate.

On March 8, 2010, Fagerland filed the instant I.C.R. 35 Motion requesting that this Court "reconsider the Judgment and Sentence entered herein February 22, 2010." Fagerland bases this motion on "a plea for leniency."

II. ANALYSIS.

A. Request for a Hearing.

In his motion, Fagerland requested a hearing. A motion to modify a sentence "shall be considered and determined by the court without the admission of addition testimony and without oral argument, unless otherwise ordered by the court in its discretion." I.C.R. 35; *see State v. Copenhaven,* 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James,* 112 Idaho 239, 242, 731 P.2d 234, 2370 (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, "[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, the Court minutes and the pre-sentence report. Nothing could be presented at a hearing that would benefit the Court. A hearing would waste counsel and the Court's time.

B. Timeliness of the I.C.R. 35 Motion.

On [March 9, 2010], Fagerland filed the instant I.C.R. 35 Motions in his two cases. Idaho Criminal Rule 35 provides in pertinent part:

> The court may correct an illegal sentence at any time and may correct a sentence that has been imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the filing of a judgment of conviction or within 120 days after the court releases retained jurisdiction. The court may also reduce a sentence upon revocation of probation or upon motion made within fourteen (14) days after the filing of the order revoking probation.

The first sentence imposed on August 23, 2005, the second sentence was imposed a week later on August 31, 2005. Those sentences are within the range of lawful sentences for the crimes for which those sentences were imposed. Fagerland has failed to even suggest any basis for determining that the imposed sentences are illegal sentences. Since they are legal sentences, under I.C.R. 35, the 120 day time period applies.

Under the facts of this case, the last day Fagerland could have filed an I.C.R. 35 motion in this action was 120 days after August 31, 2005. This court is without jurisdiction to grant leniency under I.C.R. 35. *See State v. Sutton,* 113 Idaho 832, 748 P.2d 416 (Ct. App. 1988).

C. Leniency.

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).
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> * * *
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> 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. Toolhill,* 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 August 23, 2005, was and is an appropriate sentence given Fagerland's social and criminal history and the crime(s) for which sentence was imposed. A lesser sentence would depreciate the seriousness of Fagerland's crimes. This Court concludes that the sentence imposed was and is necessary for the protection of society and the deterrence of Fagerland and others.

Because of the passage of time, Fagerland is precluded from requesting this Court reconsider the underlying sentence. Thus, it can only be inferred that Fagerland is asking this Court to reconsider the fact that this Court revoked Fagerland's probation and sent Fagerland on a retained jurisdiction program. Given Fagerland's atrocious performance on probation and inability to deal with his addictions, at least up to this point, there is simply no way for this Court to reconsider its decision and place Fagerland on probation. If Fagerland is requesting this Court to reconsider its decision and simply send Fagerland to prison to serve out the rest of his term, this Court would be more than happy to satisfy that request. Fagerland would need to make that desire clear to this Court. Otherwise, Fagerland is simply wasting this Court's time. The fact that Fagerland made his I.C.R. 35 Motion at this juncture, would tend to indicate that Fagerland himself is delusional about his current ability to be placed on probation, and would tend to indicate that Fagerland may not be taking his six-month prison based chemical dependency program serious. This Court will keep the fact that Fagerland has made this I.C.R. 35 Motion in mind at Fagerland's jurisdictional review hearing later in 2010.

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

March 15, 2010, Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, pp. 1-6. It is likely this Court was more patient with Fagerland than with any other addict with whom this Court has dealt. The patience was, in part, due to the high amount of restitution ordered, and the Court's belief that Fagerland would not make his victims whole if he were simply incarcerated. Clearly this patience was not warranted. Fagerland has repeatedly demonstrated he simply has no desire to address his addiction and no desire to conform his conduct to Idaho laws or society's appropriate norms.

Based upon all the above reasons, Fagerland's December 8, 2011, "Motion for Reconsideration of Sentence Pursuant to I.C.R. 35" filed in both cases, must be denied.

IT IS HEREBY ORDERED that Fagerland's December 8, 2011, "Motion for

Reconsideration of Sentence Pursuant to I.C.R. 35" filed in both cases is **DISMISSED.** (dismissal as opposed to denial is the appropriate outcome, *State v. Parrish,* 110 Idaho 599, 601, 716 P.2d 1371, 1373 (Ct.App.,1986)).

NOTICE OF RIGHT TO APPEAL

YOU, NICHOLAS SHAWN FAGERLAND, 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 28th day of March, 2012.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 29 day of March, 2012 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - Martin Neils 446-1701
Prosecuting Attorney - 446-1833

NICHOLAS SHAWN FAGERLAND
IDOC # 78520

Probation & Parole 769-1481 #6915

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

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____, Deputy