STATE OF IDAHO)
County of KOOTENAI) ss

FILED_____

AT _____ O'clock ___ 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.

KILO J. LE VEQUE
DOB: 07/02/1973
SSN: XXX-XX-6313
IDOC: 110075

Defendant.

Case No. **CRF 2013 11265**

ORDER DENYING I.C.R. 35 MOTION AND NOTICE OF RIGHT TO APPEAL

On January 15, 2014, KILO J. LE VEQUE was sentenced as follows:

> **COUNT I - BURGLARY, (a felony), I. C. 18-1401**, committed on June 8, 2013 – to the custody of the Idaho State Board of Correction for a fixed term of FOUR (4) years followed by an indeterminate term of SIX (6) years, for a total term not to exceed TEN (10) years.
> A FINE IN THE AMOUNT OF $1,000.00
> **POSSESSION OF A CONTROLLED SUBSTANCE (Methamphetamine), Idaho Code § 37-2732(c)(1) (a felony),** committed on June 8, 2013 – to the custody of the Idaho State Board of Correction for a fixed term of FOUR (4) years followed by an indeterminate term of THREE (3) years, for a total term not to exceed SEVEN (7) years.
> **THESE SENTENCES RUN <u>CONCURRENT</u>.**

The Court utilized a period of retained jurisdiction. On May 21, 2014, following the period of retained jurisdiction, the Court placed Le Veque on a three year period of supervised probation. On April 29, 2015, Le Veque, through counsel, Douglas A. Pierce, filed "Motion to End Probation or Reduce Terms of Probation." Oral argument on that motion was held on June 2, 2015, and the following day, the Court issued its Order Denying

Defendant's Motion to End Probation or Reduce Terms of Probation. That Order is printed below in its entirety, for reasons that will become apparent later in this decision:

> **I. INTRODUCTION.**
>
> On January 15, 2014, the defendant Kilo J. Le Veque was sentenced to four years fixed followed by an indeterminate term of six years for the felony crime of Burglary, committed on June 8, 2013. This Court imposed a period of retained jurisdiction and sent Le Veque to prison for a rehabilitation program. On May 24, 2014, following the period of retained jurisdiction, this Court placed Le Veque on supervised probation for three years.
>
> This matter came before the Court on June 2, 2015, via the defendant's "Motion to End Probation and Reduce Terms of Probation", filed April 29, 2015. In that motion Le Veque requests his three years of supervised probation be reduced to just twelve months, and that the Court "…enter an Order to the Probation Department [the Court presumes he means the State of Idaho Department of Correction, Probation and Parole] to eliminate his status in any was as a 'sex offender' or some similar label." Motion to End Probation and Reduce Terms of Probation, p. 1.
>
> The Court heard testimony from the defendant Kilo J. Le Veque and his probation officer, Lori Rawson, and argument from counsel. The Court also noted that Le Veque's court file shows Le Veque has willfully violated his three years of supervised probation which began on May 21, 2014, testing positive for alcohol on July 27, 2014, testing positive for alcohol on August 21, 2014, failing his sexual history polygraph on September 19, 2014, and testing positive for Mitragynine and 7-Hydrocymitragynine, two of the active ingredients found Kratom in Biak-Biak on May 18, 2015. For each of these offenses Le Veque has been given discretionary jail time.
>
> **II. THE DEFENDANT'S "MOTION TO END PROBATION OR REDUCE TERMS OF PROBATION" MUST BE DENIED.**
>
> The Court finds it lacks the ability to dictate how to classify and supervise Le Veque to an executive branch agency such as the State of Idaho Department of. Le Veque's motion flies in the face of the doctrine of separation of powers. *Searcy v. Idaho State Bd. of Correction*, --- P.3d ----, 2015 WL 160361, p. 4 (Ct. App. January 14, 2015). On this issue the Idaho Supreme Court has held:
>
> > "The courts will refrain from second-guessing the legislative and executive branches on issues of basic policy. Under our system of separation of powers, such decisions are vested in the politically responsive coordinate branches. * * *
> > "In addition, courts must not intrude into realms of policy exceeding their institutional competence. The judicial branch lacks the fact-finding ability of the legislature, and the special expertise of the executive departments.... [Courts] should not attempt to balance the detailed and competing elements of legislative or executive decisions."
>
> *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987)

(quoting *Industrial Indem. Co. v. State,* 669 P.2d 561, 563 (Alaska 1983) (citations omitted)); *see also, Julius Rothschild & Co. v. State,* 66 Hawaii 76, 655 P.2d 871, 881 (Hawaii 1982). The Idaho Supreme Court noted the policy against "plac[ing] the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government." 113 Idaho 202, 206, 743 P.2d 70, 74, citing *Johnson v. State,* 69 Cal.2d 782, 73 Cal.Rptr. 240 447 P.2d 352, 360 (1968)447 P.2d at 360. *State v. Thiel,* 158 Idaho 103, ___, 343 P.3d 1110, 1118 (February 27, 2015) also provides a good discussion by the Supreme Court of Idaho on separation of powers.

Counsel for Le Veque argued that the Idaho Department of Corrections policy for classifying sex offenders was "arbitrary and capricious", but other than repeating that statement several times at increasing levels of volume, offered no facts or legal argument in support of that bald claim. This Court notes, "A reviewing court 'shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.'" Idaho Code § 67–5279(1). *Brett v. Eleventh Street Dockowner's Association, Inc.*, 141 Idaho 517, 521, 112 P.3d 805, 809 (2005) (citing I.C. 67—5279(1)). Probation and Parole Officer Lori Rawson testified that the Idaho Department of Correction's procedure to determine who should be classified as being supervised as a sex offender is based on two criteria: 1) the sex offense crime as originally charged (in Le Veque's case, second degree rape, a felony in South Dakota, even though he later pled guilty to a misdemeanor) and 2) whether the probationer has been crime free for ten years following that sex offense (Le Veque's offense in South Dakota was in 2011 and a conviction in 2012). That policy is simply not arbitrary and capricious. This Court will not substitute is judgment for the judgment of the Idaho Department of Corrections.

[III]. THE COURT FINDS THE DEFENDANT'S TERM OF PROBATION MUST BE EXTENDED BASED UPON DEFENDANT'S MULTIPLE VIOLATIONS.

The Court also finds that due to Le Veque's multiple violations of probation, that his supervised probation must be continued for an additional one year, and now ends on May 21, 2018. "Idaho Code § 20–221 provides that the court may impose and may, at any time, modify any conditions of probation or suspension of sentence. Our Supreme Court has also held that 'after a judge has granted probation, he retains jurisdiction during the probationary period, and has continuing discretion to modify its conditions." *State v. Garcia,* 124 Idaho 474, 475, 860 P.2d 677, 678 (Ct. App. 1993) (citing *State v. Oyler,* 92 Idaho 43, 47, 436 P.2d 709, 713 (1968). The Court finds that this one-year extension is necessary for LeVeque's rehabilitation and for the protection of the public. Without question, the primary purpose of probation is rehabilitation. *State v. Harvey,* 142 Idaho 727, 732, 132 P.3d 1255, 1259 (Ct. App. 2006); *State v. McCool,* 139 Idaho 804, 807, 87 P.3d 291, 294 (2004); *State v. Dana,* 137 Idaho 6, 8, 43 P.3d. 767, 767 (2002). Achieving rehabilitation through probation, however, must be attained while protecting the safety of the public. *State v. Wardle,* 137 Idaho 808, 810, 53 P.3d 1227, 1229 (Ct. App. 2002).

[IV]. ORDER.

IT IS HERBY ORDERED THAT KILO J. LE VEQUE's Motion to End Probation and Reduce Terms of Probation is DENIED in all aspects.

IT IS FURTHER ORDERED THAT KILO J. LE VEQUE's term of probation is extended by one year and now ends on May 21, 2018.

Order Denying Defendant's Motion to End Probation or Reduce Terms of Probation, pp. 1-3.

On December 9, 2015, Le Veque, through counsel, Douglas A Pierce, filed the instant I.C.R. 35 Motion requesting that . Le Veque bases this motion on an "illegal sentence" under I.C.R. 35, and claims "This sentence became illegal on the fact of the record when Probation demanded that the Defendant be treated as a 'sex-offender'". Rule 35 Motion, p. 2. Le Veque continues, "The basis of this motion, in addition to all the records and files of this action, including the Defendant's Brief which will be timely filed, is that due to the probation department illegally and unconstitutionally mislabeling and misidentifying him as some sort of sex offender, he has not only been unable to secure the interstate compact that this Court ordered, but has been subject to illegal treatment regarding the terms of his probation." *Id.* Le Veque's I.C.R. 35 is absurd, both factually and legally.

Counsel for Le Veque admits Le Veque was charged in South Dakota with rape in 2010 or early 2011, and he pled guilty to "Sexual Contact without Consent" a "Class 1 misdemeanor." *Id.,* pp. 2, 3. The victim in that case was Le Veque's cousin (whose name will be withheld for purposes of this opinion). Report of Probation Violation dated October 28, 2015, p. 2. While on probation in the present case, La Veque was ordered by his probation officer to take a polygraph test, to of the questions asked on September 11, 2015, were "Did you have sexual intercourse with your cousin, _____, when she didn't want to in 2011?" and "Even one time, did you have sexual intercourse with your cousin _____, when she didn't want to?" *Id.* La Veque answered "No" to both of those and,

allegedly, his polygraph showed as deceptive, *Id.*

Regarding his I.C.R. 35 Motion, counsel for La Veque noticed up a hearing for January 20, 2015.

A hearing was held on December 15, 2015, an admit – deny hearing on his October 28, 2015, Report of Probation Violation. At that hearing, La Veque denied violating his probation as alleged, and the Court scheduled an evidentiary hearing. At that December 15,2 015, hearing, La Veque also argued his motion that he should be released on his own recognizance until the three-hour evidentiary hearing could be held on February 2, 2016. The Court denied that motion.

At the December 15, 2015, hearing, the Court asked La Veque's counsel, Douglas A. Pierce, how the I.C.R. 35 Motion was different than the Motion to End Probation or Reduce Terms of Probation, which this Court (above) denied. Pierce gave no cogent explanation as to how they were different. The Court clarified that this I.C.R. 35 Motion was a motion to correct a legal sentence, and Pierce responded "yes". The Court asked what the Court had done, when it imposed sentence, that would now cause La Veque's sentence to be illegal. Pierce gave no cogent answer.

The Court is aware that La Veque requested a hearing, and had a time scheduled for such a hearing. La Veque's counsel, Douglas A. Pierce then questioned the Court's ability to deny his motion without a hearing. The Court directed Pierce to the cases annotating I.C.R. 35. 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. 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.

The sentence imposed on January 15, 2014, is clearly within the range of lawful sentences for the crime for which sentence was imposed. Thus, it is an illegal sentence. Idaho Criminal Rule 35(a) reads, "The court may correct a sentence that is illegal from the face of the record at any time." What the State of Idaho Department of Correction, an executive branch agency, through one of its Probation and Parole officer, does not, and cannot in any possible way, make that legal sentence imposed on January 15, 2014, somehow illegal on December 15, 2015. Idaho Criminal Rule 35 is directed to judges, not to the Governor of the State of Idaho. Idaho Criminal Rule 35(a) give a judge the opportunity to correct an illegal sentence before the Idaho Supreme Court or the Idaho Court of Appeals tells that judge that his sentence was illegal. Idaho Criminal Rule 35(b) gives a judge the opportunity to exercise his or her discretion and reduce a sentence, when such motion is timely made. And while evidence can be presented in an I.C.R. 35(b) motion, such evidence cannot be presented in an I.C.R. 35(a) motion, because, any alleged illegal sentence must be "illegal from the face of the record." Le Veque has failed

to even suggest any basis for determining that the imposed sentence is an illegal sentence.

IT IS THEREFORE ORDERED that Le Veque's I.C.R. 35(a) Motion is **DENIED.**

IT IS FURTHER ORDERED that the hearing on Le Veque's I.C.R. 35(a) Motion set for January 20, 2015, at 2:00 p.m., is **VACATED.**

NOTICE OF RIGHT TO APPEAL

YOU, KILO J. LE VEQUE, 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 15th day of December, 2015.

_____
John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of December, 2015 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - Douglas Pierce
Prosecuting Attorney -

KILO J. LE VEQUE
IDOC # 110075

Probation & Parole

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

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____, Deputy