

FILED \_\_\_\_\_

AT \_\_\_\_\_ O'clock \_\_\_ M  
CLERK, DISTRICT COURT

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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. )  
 )  
 ) ZACHARY D. ARMSTRONG )  
 )  
 ) Defendant. )  
 )

Case No. **CRF 2010 4258**

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

On June 17, 2010, Zachary D. Armstrong (Armstrong), was sentenced, to wit:

**POSSESSION OF A CONTROLLED SUBSTANCE (Oxycodone), (a felony), Idaho Code § 37-2732(c)(1), committed on March 3, 2010, -- to the custody of the Idaho State Board of Correction for a fixed term of TWO years followed by an indeterminate term of THREE (3) years for a total term not to exceed FIVE (5) years.**

On November 4, 2010, following his retained jurisdiction, this Court placed Armstrong on four years supervised probation. On September 1, 2011, a Report of Violation was filed by Armstrong’s probation officer, alleging Armstrong had violated his probation, and recommending Armstrong be given another retained jurisdiction, specifically a CAPP retained jurisdiction which focuses on substance abuse treatment. On October 17, 2011, Armstrong admitted he violated his probation and this Court revoked Armstrong’s probation and placed Armstrong on a CAPP retained jurisdiction.

On October 26, 2011, Armstrong filed the instant I.C.R. 35 Motion requesting “...the Court to reconsider the Judgment and Sentence entered herein on October 17, 2011.” Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, p. 1. Armstrong

bases this motion on "...a plea for leniency." *Id.* No other reasons or relief requested are set forth in Armstrong's Rule 35 Motion.

Idaho Criminal Rule 35 provides in part that

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 sentence imposed on June 17, 2010, is within the range of lawful sentences for the crime for which sentence was imposed. Armstrong has not suggested any basis for determining that the imposed sentence is an illegal sentence. Since it is a legal sentence, under I.C.R. 35, the 120 time period could apply. The action taken by the Court is long beyond 120 following imposition of sentence on November 4, 2010, and this court has not released any period of retained jurisdiction (relinquished jurisdiction). However, the last sentence is the applicable provision, as Armstrong filed his motion within fourteen days of revocation of his probation.

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. 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, "[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. 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 November 4, 2010, was and is an appropriate sentence

given Armstrong's social and criminal history and the crime for which sentence was imposed. A lesser sentence would depreciate the seriousness of Armstrong's crime. This Court concludes that the sentence imposed was and is necessary for the protection of society, the deterrence of Armstrong and others, and for Armstrong's rehabilitation.

If Armstrong is not moving this Court to reconsider the years of his sentence, but is instead moving this Court to reconsider its decision to impose a second period of retained jurisdiction, there are several difficulties with such claim. First, Armstrong has not made such claim in his I.C.R. 35 motion. Second, such relief is not contemplated by I.C.R. 35. Third, such relief would not be considered by this Court as this Court has concluded that Armstrong desperately needs treatment, specifically the CAPP retained jurisdiction, and this Court came to that conclusion after reviewing the entire file, Armstrong's record, considering all argument from the attorney, and hearing from Armstrong himself.

**IT IS THEREFORE ORDERED** that Armstrong's I.C.R. 35 motion is **DENIED**.

#### **NOTICE OF RIGHT TO APPEAL**

**YOU, Zachary D. Armstrong, 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 31<sup>st</sup> day of October, 2011.

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John T. Mitchell, District Judge

#### **CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of October, 2011 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Sarah Sears  
Prosecuting Attorney -  
ZACHARY D. ARMSTRONG, IDOC # 85937

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

**CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY**

BY: \_\_\_\_\_, Deputy

