

week after his sentencing on the above methamphetamine charge, on August 31, 2005, Fagerland was sentenced as follows:

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.

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 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, 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 February 22, 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).

* * *

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.

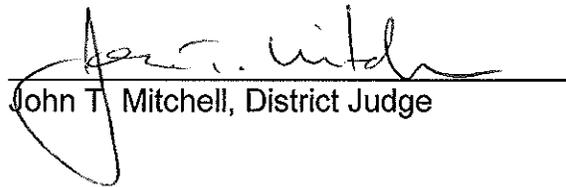
IT IS THEREFORE ORDERED that Fagerland's I.C.R. 35 Motion is **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, 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 15th day of March, 2010.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 15 day of March, 2010 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

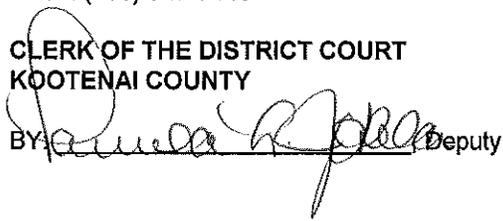
Defense Attorney - Martin Neils 446-1701
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NICHOLAS SHAWN FAGERLAND
IDOC # 78520

Probation & Parole

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**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY  Deputy