STATE OF IDAHO)
County of KOOTENAI) ss

FILED 11-905

AT 8:07 O'clock AM
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.

BRIAN E. PHILLIPS

Defendant.

Case No. **CRF 2004 27167**

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

On May 9, 2005, Phillips, was sentenced as follows:

> **LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, (a felony), Idaho Code § I.C. 18-1508, committed between September 2002 and November 2004 – to the custody of the Idaho State Board of Correction for a fixed term of TWO AND ONE HALF (2.5) years followed by an indeterminate term of LIFE, for a total term not to exceed LIFE.**

Sentencing Disposition, p. 2. In the sentencing order filed that same date, the Court clearly explained the reason for that sentence:

> **IT IS STRONGLY RECOMMENDED THAT YOU PARTICIPATE IN ANY SEX OFFENDER TREATMENT PROVIDED BY THE DEPARTMENT OF CORRECTIONS. THE STATE OF IDAHO BOARD OF PARDONS AND PAROLE IS ENCOURAGED TO CONSIDER PAROLE IF HE SUCCESSFULLY COMPLETES SUCH SEX OFFENDER TREATMENT AND IF HE CAN BE CLOSELY SUPERVISED FOR MANY YEARS ON PAROLE.**

Id. pp. 2-3. On June 24, 2005, Phillips filed the instant "Motion" which, other than citing I.C.R. 35, requested no relief and stated no basis for the motion. On September 16, 2005, Phillips filed an "Amended Motion for Rule 35 " requesting...an order reducing the

Defendant's sentence...on the grounds and for the reason that the sentence was excessive." Amended Motion for Rule 35, p. 1. Defendant requested a hearing and noticed his motion for hearing on November 8, 2005. On November 7, 2005, defendant's counsel called and cancelled the hearing. The State of Idaho has not responded to either motion.

Phillips claims his sentence was excessive, and appears to make no claim that his sentence was illegal. The sentence imposed was within the limits of Idaho Code § 18-1505, Lewd Conduct with a Minor Child Under Sixteen. The sentence was legal. Next, the Court must examine whether the sentence was excessive.

Even though a hearing was requested, the 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, 887 P.2d 67 (Ct.App. 1994). The Court has reviewed the Motion and Amended Motion for Rule 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, 50 P.3d 472 (2002). The decision to grant or deny leniency is left to the sound discretion of the court. *Id.*

> A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court. ... Such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe....
>
> * * *
>
> 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. (Citations omitted) *State v. Forde,* 113 Idaho 21, 22, 740 P.2d 63 (Ct. App. 1987).

See also State v. Adams, 137 Idaho 275, 47 P.3d 778 (Ct.App. 2002).

The sentence imposed on May 9, 2005, was and is an appropriate sentence given Phillips's social and criminal history and the crime for which sentence was imposed. A lesser sentence would depreciate the seriousness of Phillips's crimes. I conclude that the sentence imposed was and is necessary for the protection of society and the deterrence of Phillips and others. The Court's reasons are as follows.

The Court made it clear at the sentencing hearing and in the Court's Sentencing Disposition that Phillips, **if** he successfully completes the sex offender treatment program, **needs lifetime supervision on parole.** Any term of parole is limited to the indeterminate term of the sentence. *State v. Knight,* 114 Idaho 923, 762 P.2d 836 (Ct.App. 1988), I.C. §20-223. Thus, for the need to protect society alone, the indeterminate life sentence is necessary.

The sentence imposed by the Court may not have been the sentence anticipated by Phillips. This may have been what prompted these motions. Through the Kootenai County Prosecutor, the State of Idaho had entered into a plea agreement whereby it agreed to limit its recommendation at sentencing to no more than a retained jurisdiction recommendation. Under the retained jurisdiction program, the offender attends a six-month sex offender **evaluation** program. The retained jurisdiction program for sex offenders is not a **treatment** program. It is merely designed to assist the offender in coming to full realization and admission of his or her past acts, and it provides an assessment to be used by the Court as to whether the offender is an acceptable risk to be placed on probation after the end of the six-month evaluation. The Court did not utilize that joint recommendation by the prosecutor and defense counsel for the following reasons. **First,** it is clear Phillips needs **treatment**, not evaluation. It would have been a waste of State resources and Phillips' time to be evaluated on a retained jurisdiction program. Phillips seemed to have come to grips with what he had done, so that reason

for a retained was not present. **Second,** the pre-sentence investigator specifically and unequivocally stated:

> The defendant is not considered a candidate at this time for supervised probation. * * * Many first time sexual offenders are granted the opportunity for the retained jurisdiction program. In this case, **I do not believe Mr. Phillips should be granted a retained jurisdiction**. The recommendation for imposition of sentence is due to the prior offense of Mr. Phillips and he would obtain more valuable assistance through the **programming** at the Orofino institution.

April 6, 2005 Pre-Sentence Report, p. 15. (emphasis added). It is important to understand that "programming" referred to is the treatment that is available in prison, and not the evaluation available on the retained jurisdiction program. **Third,** protection of society mandates treatment in prison, not evaluation in the retained jurisdiction program. The victim in the present case is at least the third minor female household member who endured prolonged sexual abuse by Phillips. The victim in this case indicated that the sexual abuse by Phillips had gone on in the home for four or more years. *Id.* p. 3. The victim is Phillips' step-daughter, and she was 14 years old at Phillips' sentencing. *Id.* p. 1. Additionally, Phillips' oldest daughter detailed Phillips' sexual abuse of her next younger sister that lasted from 1977 to 1984 (from age 8 to 15 years old), and Phillips' sexual abuse of her youngest sister from 1980 to 1984 (from age 8 to 12 years old). April 11, 2005 report of Scott Grant. At the time of sentencing, Phillips was assessed by Dr. Wert, a Certified Sex Offender Treatment Provider as follows: "... without **substantial treatment,** Brian Phillips is a moderate to high risk of sexual reoffense." *Id.* p. 12. (emphasis added). Since there is no treatment on the retained jurisdiction program, there is no possible way Phillips could be placed on probation at the conclusion of the retained jurisdiction period. Even if there were treatment on a retained jurisdiction, society could not be protected by a mere six-

month program. With the sentence that was imposed, after a two and one half year **treatment** program in prison, if Phillips can convince professional sex offender treatment providers, at least one psychiatrist or psychologist selected by the Board of Pardons and Parole (required by Idaho Code § 20-223) and the State of Idaho Board of Pardons and Parole, that he is an acceptable risk to be placed on probation, then, and only then should he be allowed parole. If that occurs, the Board of Pardons and Parole must be given the ability to have that parole period last at least potentially the remainder of Phillips' life.

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

NOTICE OF RIGHT TO APPEAL

YOU, Phillips, 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 9th day of November, 2005.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 9 day of November, 2005 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - John Redal
Prosecuting Attorney – Lansing Haynes

BRIAN E. PHILLIPS
IDOC # 77371

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

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY: _____, Deputy