

treatment and extensive cognitive restructuring to address his entrenched criminal thinking. On February 18, 2004, due to Vandours' poor performance while on the retained jurisdiction program, the Court relinquished jurisdiction and imposed the sentences describe above without modification.

On February 5, 2013, Vandouris filed a "Motion for Credit or Reduction of Sentence ICR 35." That motion was accompanied by a "Motion and Affidavit for Appointment of Counsel" and a "Motion for Hearing." The motion for appointment of counsel must be denied as there is no merit to the I.C.R. 35 Motion. As to Vandouris' "Motion for Hearing, the Court has determined that oral argument is not necessary for resolution of the issue presented by the motion. 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, 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).

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 August 28, 2003, is within the range of lawful sentences for the crime for which sentence was imposed. Vandouris has failed to even suggest 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 applies.

Under the facts of this case, the last day Vandouris could have filed an I.C.R. 35 motion in this action was 120 days after February 18, 2004, the date of the Retained Jurisdiction Disposition and Notice of Right to Appeal. Vandouris' time expired on June 18, 2004. Thus, Vandouris is nearly nine years late in filing his I.C.R. 35 Motion. Thus, 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).

Vandouris claims this is an illegal sentence, in that he checked the box on the form which reads: "The sentence is illegal and should be changed on the following grounds:" Motion for Credit or Reduction of Sentence ICR 35, p. 2. However, nothing listed following that pre-printed sentence indicates the sentence is in any way illegal. In Vandouris' narrative following that pre-printed sentence, Vandouris notes he was on parole twice and then violated parole on both occasions. Vandouris now complains that the parole commission "took away all of my street time". *Id.* Vandouris apparently, and incorrectly, feels he is entitled credit for time served while out in society on parole. The Court's ability to grant "credit" for time served is found in Idaho Code § 18-309. That statute provides as follows:

In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration prior to entry of judgment, if such incarceration was for the offense or an included offense for which the judgment was entered. The

remainder of the term commences upon the pronouncement of sentence and if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

The statute clearly demonstrates defendant's lack of entitlement to credit for time released on parole. The statute speaks in terms of incarceration. Vandouris was not incarcerated during the time that he was released on parole. Further, the final sentence of this statute clearly excludes from application of Idaho Code § 18-309 the time that a defendant is lawfully released. Accordingly, there is no basis for granting Vandouris additional credit for time served.

“For the purpose of Rule 35, an illegal sentence is one in excess of a statutory provision or otherwise contrary to applicable law.” State v. Lee, 116 Idaho 515, 516, 777 P.2d 737, 738 (Ct.App. 1989). The unified sentences described above are all within the maximum provided by law for those various crimes. Actions of the parole commission are simply irrelevant to the legality of this sentence. Indeed, it would be an unlawful act for this Court to modify its sentence in response to the parole commission's decision to deny parole. See State v. Heyrend, 129 Idaho 568, 929 P.2d 744 (Ct.App. 1996) (the district court “usurped the constitutional duties of the executive branch of government” when it removed the defendant from custody because the parole commission had denied parole).

IT IS THEREFORE ORDERED that Vandouris's I.C.R. 35 motion is **DENIED** and the same hereby is dismissed for lack of jurisdiction. Since the Court has no jurisdiction to hear the I.C.R. 35 motion, the Motion for Hearing and Motion and Affidavit in Support for Appointment of Counsel are **DENIED** as well.

NOTICE OF RIGHT TO APPEAL

YOU, GREGORY LEE VANDOURIS, 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 11th day of February, 2013.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of February, 2013 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

GREGORY LEE VANDOURIS
IDOC # 71344
ICIO Givens Hall
381 West Hospital Drive
Orofino, ID 83544

Prosecuting Attorney -

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

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy