

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.)
)
) ROBERT CLIFTON LEVEQUE)
) DOB: 08/10/1961)
) SSN: XXX-XX-6340)
) IDOC: 68864)
)
) Defendant.)
)
 _____)

Case No. **CRF 2016 14138**

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

On November 14, 2016, Robert Clifton Leveque (Leveque), was sentenced, to wit:

POSSESSION OF A CONTROLLED SUBSTANCE

(METHAMPHETAMINE) (a felony), Idaho Code § 37-2732(c)(1), committed on July 24, 2016 – To the custody of the State of Idaho Board of Correction for a fixed sentence of THREE (3) years followed by an indeterminate sentence of FOUR (4) years for a total unified sentence of SEVEN (7) years.

Sentencing Disposition and Notice of Right to Appeal 1. The Court imposed that sentence on that date and retained jurisdiction for up to one year. *Id.* 2. Due to Leveque’s poor performance during his period of retained jurisdiction, on December 12, 2017, this Court relinquished jurisdiction and imposed Leveque’s prison sentence.

Retained Jurisdiction Disposition and Notice of Right to Appeal, 1-2.

On December 15, 2017, Leveque, through counsel, deputy public defender, Benjamin Onosko, filed the instant Motion for Reconsideration or Reduction of Sentence to [sic] I.C.R. 35, requesting “the court to reduce the Judgment and Sentence entered herein November 14, 2016, and imposed on December 12, 2017, from a period of not

less than 3, not more than 7, to a period of not less than 2, not more than 5.” Motion for Reconsideration or Reduction of Sentence to [sic] I.C.R. 35, 1.

Idaho Criminal Rule 35 provides in part:

(b) Within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction, a motion may be filed to correct or reduce a sentence and the court may correct or reduce the sentence. The Court may also reduce a sentence on revocation of probation or on motion made within 14 days after the filing of the order revoking probation.

The sentence imposed on August 16, 2017November 15, 2016, is within the range of lawful sentences for the crime for which sentence was imposed. Leveque 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. Leveque’s motion is timely.

Oral argument on Leveque’s I.C.R. 35 Motion was held on January 24, 2018. Leveque was represented by a different deputy public defender, Jeanne Howe. Even though the Court denied Leveque’s motion to be transported from the Idaho State Penitentiary to the Kootenai County Jail for purposes of this hearing, Leveque was present.

As mentioned above, Leveque’s Rule 35 motion was limited to a request that this Court reduce his prison sentence. However, counsel for Leveque at oral argument changed the relief sought to outright probation, or perhaps another period of retained jurisdiction. There are problems with Leveque’s changing horses in mid-stream. First, is a lack of notice to the State of Idaho. Second, such newly requested relief could be an impermissible second Rule 35 Motion. *State v. Hickman*, 119 Idaho 7, 802 P.2d 1219 (Ct. App. 1990). In spite of these procedural problems, the Court will discuss these verbal requests for relief below.

The Court has reconsidered Leveque's sentence and finds it appropriate. Leveque's prior criminal record is astonishing. According to his presentence report, his record began almost three decades ago, on June 8, 1981, with a DUI conviction in Washington. Subsequently: 1991 DUI amended to reckless endangerment; 1991 controlled substance misdemeanor; 1993 DUI; 1993 malicious mischief, two counts; 1994 DUI; June 1994 felony controlled substance methamphetamine and a probation violation on that charge four months later; October 1994 felony controlled substance methamphetamine and felony controlled substance heroin; 1995 felony controlled substance methamphetamine; 1995 DUI; 1995 misdemeanor possession of marijuana, two counts; 1995 driving with a suspended license and habitual traffic offender; August 1995 felony controlled substance heroin; 1997 felony controlled substance methamphetamine; 1998 felony forgery and probation violations on his prior drug charges; 1998 driving with a suspended license and habitual traffic offender; 1999 another probation violation on his prior drug charges; 1999 felony burglary amended to possession of stolen property; 1999 another probation violation on his prior drug charges and prison sentences were imposed; 1999 felony escape; 2002 felony possession of methamphetamine; 2002 felony possession of a controlled substance; 2003 driving with a suspended license; 2004 felony possession of a controlled substance methamphetamine; and 2016 inattentive driving. Presentence Report 4-15.

The facts of the instant case only provide more examples of the same very consistent behavior by Leveque. The arresting officer observed Leveque driving a motorcycle and knew Leveque had a suspended license. When stopped, Leveque was found with a vial of methamphetamine in his pocket. A syringe and more methamphetamine was found in a storage compartment on the motorcycle. *Id.* at 3. Leveque was assessed on the Level of Service Index (LSI) at a 36, as being a high risk to

reoffend. *Id.* at 23.

Trying to give Leveque every benefit of the doubt, the Court imposed the three year fixed four year indeterminate prison sentence, but gave Leveque the benefit of a retained jurisdiction, the opportunity to go to prison for less than a year and try to prove to the Court that he could follow rules. Leveque squandered that opportunity in quite remarkable style. After six months of being on the period of retained jurisdiction, on June 2, 2017, the Idaho Department of Corrections issued a report recommending the court relinquish jurisdiction and impose his prison sentence, detailing the plethora of instances where Leveque failed to comply with IDOC's rules. The Court sent Leveque back to the Department of Corrections to see if his behaviors in custody could improve before the one-year period of retained jurisdiction expired. It did not. On October 23, 2017, the Idaho Department of Corrections issued another report recommending the court relinquish jurisdiction and impose his prison sentence, again documenting Leveque's many instances where he failed to follow IDOC's rules. Still later, on November 22, 2017, the Idaho Department of Corrections issued a report recommending the court relinquish jurisdiction and impose his prison sentence. If Leveque will not follow even the most basic rules while in a custodial setting, this Court finds there is no hope that Leveque will conform his conduct in the community to the laws of society. Nearly three decades of criminal behavior and nearly one year of rule violating behavior on the retained jurisdiction program have left the Court with no need of a crystal ball.

As to the remedy requested by Leveque in his written Rule 35 Motion, the Court will not reduce his sentence as the public needs to be protected for as long a period of time as possible. As to the remedies requested by Leveque through counsel at oral argument, the Court will not consider placing Leveque on probation as it is a virtual certainty that he will not comply with probation terms and will endanger the public; and the

Court will not consider a period of retained jurisdiction as Leveque already had that opportunity, and failed, and was given two other chances on that period of retained jurisdiction to change his behaviors, and instead he chose not to change those behaviors.

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

NOTICE OF RIGHT TO APPEAL

YOU, Robert Clifton Leveque, 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 24th day of January, 2018.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of January, 2018 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Prosecuting Attorney – Casey Simmons

ROBERT CLIFTON LEVEQUE
IDOC #
SICI
P. O. Box 8509
Boise, ID 8370768864

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

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy