

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. )  
 )  
DONALD FOWLER PHELPS )  
 )  
 ) DOB: 2-22-57 )  
 ) SSN: 547-25-3505 )  
 ) IDOC: 62501 )  
 )  
 ) Defendant. )  
 )  
\_\_\_\_\_ )

Case No. **CRF 2000 5777**

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

On February 6, 2001, Phelps, was sentenced by the Honorable James F. Judd, to

wit:

**COUNT I - RAPE, a felony**, committed during the years 1992 to 1999 - to the custody of the Idaho State Board of Correction for a fixed term of fifteen (15) years followed by an indeterminate term of Life, for a total term not to exceed Life. This sentence shall be served concurrently with the other sentences in this matter.

**COUNT II - RAPE, a felony**, committed during the years 1992 to 1999 - to the custody of the Idaho State Board of Correction for a fixed term of fifteen (15) years followed by an indeterminate term of Life, for a total term not to exceed Life. This sentence shall be served concurrently with the other sentences in this matter.

**COUNT III - LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, a felony**, committed during the years 1992 to 1999 - to the custody of the Idaho State Board of Correction for a fixed term of fifteen (15) years followed by an indeterminate term of Life, for a total term not to exceed Life. This sentence shall be served concurrently with the other sentences in this matter.

**COUNT IV – FELONY INJURY TO CHILDREN, a felony**, COMMITTED DURING THE YEARS 1992 TO 1999 – TO THE CUSTODY OF THE Idaho State Board of Correction for a fixed term of ten (10) years followed by an indeterminate term of zero (0) years, for a total term not to exceed then (10) years. This sentence shall be served concurrently with the other sentences in this matter.

On November 4, 2011, Reinke filed a Motion for Credit for Time Served. On November 14, 2012, this Court entered its I.C.R. 35 Order Confirming Credit for time served and Notice of Right to Appeal. That Order added 57 days credit for time served as of June 22, 2011, increasing his credit from 648 days listed in the minute entry order dated June 22, 2011, to 705 days. **COUNT IV - FELONY INJURY TO CHILDREN, a felony**, committed during the years 1992 to 1999 - to the custody of the Idaho State Board of Correction for a fixed term of ten (10) years followed by an indeterminate term of zero (0) years, for a total term not to exceed ten (10) years. This sentence shall be served concurrently with the other sentences in this matter.

On November 23, 2012 April 11, 2001, Phelps filed the instant Motion for Reconsideration or Reduction of Sentence, I.C.R. 35 Motion, requesting additional credit for time served from August 20, 2010 to February 14, 2011. Reinke also filed on November 23, 2012, a Motion and Affidavit for Permission to Proceed on a Partial Payment of Court Fees (Prisoner), and a Motion for Hearing.

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 February 6, 2001, is within the range of lawful sentences for the crime for which sentence was imposed. Phelps 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.

Judge Judd imposed those prison sentences.

On April 11, 2001, Phelps filed a motion for leniency under I.C.R. 35. On August 21, 2001, Judge Judd denied that motion in his “Order Denying I.C.R. 35 Motion and Notice of Right of Appeal.” Phelps appealed his sentences and his denial of his I.C.R. 35 Motion and on February 8, 2002, the Idaho Court of Appeals issued its decision affirming Judge Judd’s sentences and affirming Judge Judd’s decision denying Phelps’ I.C.R. 35 Motion. 2002 Unpublished Opinion No. 535.

The undersigned, upon his appointment as District Judge on November 21, 2001, inherited those cases assigned to Judge Judd upon his retirement.

On January 19, 2016, Phelps filed a “Motion for Correction or Reduction of Sentence, ICR 35.” In that motion, Phelps claims his sentences were illegal. Motion for Correction or Reduction of Sentence, ICR 35, pp. 1, 2. Contemporaneous with that filing, Phelps also filed a “Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (Prisoner)”, a “Motion for Hearing”, and a “Motion and Affidavit in Support for Appointment of Counsel.” Phelps then provided a narrative as to why he felt the sentences were illegal, some of which discussed allegations which are more appropriate to a post-conviction relief case, but which do not make his sentences illegal, and one of which pertained his issues in his presentence report, which was litigated in his appeal to the Idaho Court of Appeals. 2002 Unpublished Opinion No. 535, pp. 2-4. Phelps requests the Court reduce his sentence from two counts of rape to one count of rape. Motion for Correction or Reduction of Sentence, ICR 35, p. 6.

Under I.C.R. 35(a), there is no time limit within which to file a motion for an illegal sentence. This Court finds the sentences imposed in all four counts were within the maximum allowed by statute for those four crimes to which Phelps pled guilty. Thus, none of these sentences were illegal.

This Court also finds this is a second I.C.R. 35 Motion for a reduction of his sentence and successive motions are not allowed under *State v. Heyrend*, 130 Idaho 482, 943 P. 2d 72 (Ct. App. 1996); and *State v. Hurst*, 151 Idaho 430, 258 P.3d 950 (Ct. App. 1993).

Phelps requested a hearing. 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). No hearing is necessary on the grounds stated in this motion and the reasons set forth in this decision for the denial of the same.

Phelps requested counsel be appointed. Where a defendant's Rule 35 motion is without merit, he is not entitled to appointment of counsel to represent him on the motion. *State v. Wade*, 125 Idaho 522, 873 P.2d 167 (Ct. App. 1994). The Court finds Phelps' current motion to be without merit for the reasons set forth above.

Phelps requested a waiver of court fees. There are no court fees involved in a motion under I.C.R. 35. Thus, that motion is denied. The Court has considered Phelps' I.C.R. 35 Motion without his payment of any fee.

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

**IT IS FURTHER ORDERED** Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (Prisoner) is **DENIED**.

**IT IS FURTHER ORDERED** Motion for Hearing is **DENIED**.

**IT IS FURTHER ORDERED** Motion and Affidavit in Support for Appointment of Counsel is **DENIED**.

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

**YOU, Phelps, 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 29<sup>th</sup> day of February, 2016.

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John T. Mitchell, District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of February, 2016 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Donald Phelps  
IDOC No. 62501  
ISCI 16B-1B  
P. O. Box 14  
Boise, ID 83707-0014

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

**CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY**

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