

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,	)	Case No.	<b>CRF 2013 15913</b>
	)		<b>CRF 2016 8627</b>
Plaintiff,	)		
vs.	)		
	)	<b>ORDER DENYING I.C.R. 35</b>	
<b>MICHAEL FAIN</b>	)	<b>MOTION AND NOTICE OF</b>	
DOB: 06/05/1958	)	<b>RIGHT TO APPEAL</b>	
SSN: xxx-xx-2628	)		
IDOC: 110522	)		
Defendant.	)		

**I. PROCEDURAL BACKGROUND.**

On September 27, 2018, as a result of a probation violation for absconding to Mexico while on supervised probation and while defendant Michael Fain (Fain) was participating in the Kootenai County Mental Health Court, this Court revoked Fain’s probation and imposed Fain’s prison sentences as follows:

**CRF 2013 15913 - OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL to the custody of the State of Idaho Board of Correction for a fixed sentence of TWO (2) years followed by an indeterminate term of TWO (2) years for a total unified sentence of FOUR (4) years.**

**CRF 2016 8627 - OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL to the custody of the State of Idaho Board of Correction for a fixed sentence of THREE (3) years followed by an indeterminate term of THREE (3) years for a total unified sentence of SIX (6) years.**

**THIS SENTENCE RUNS CONCURRENT WITH THE SENTENCE IMPOSED IN CRF 2013 15913.**

On October 24, 2018, Fain timely filed the instant “Motion for Reconsideration of Sentence Pursuant to I.C.R. 35”, requesting that “the Court reconsider the Probation

Violation Disposition and Notice of Right to Appeal entered herein September 27, 2018.”

Mot. for Recons. of Sentence Pursuant to I.C.R. 35, 1. Fain requested a hearing. *Id.* 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. Copenhaver*, 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). The Court has reviewed the Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, and Fain’s entire file including Fain’s weekly notes regarding his performance, or lack thereof, while in the Kootenai County Mental Health Court. 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.

## **II. ANALYSIS.**

### **A. FAIN HAS NOT SET FORTH A VALID BASIS FOR HIS MOTION, NOR HAS FAIN SET FORTH ANY EVIDENCE TO SUPPORT HIS MOTION.**

Where a sentence as originally imposed is not illegal, the defendant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). “To establish that the sentence imposed was improper, the defendant must show that in light of the governing criteria,

[the] sentence was excessive under any reasonable view of the facts.” *Id.* (quoting *State v. Broadhead*, 120 Idaho 141, 143-45, 814 P.2d 401, 403-05 (1991) (citations omitted)).

When a defendant does not identify what evidence he or she might have produced at a hearing that could not have been produced through affidavits, the district court does not abuse its discretion in refusing to hold a hearing on his or her Rule 35 motion. *State v. Ramirez*, 122 Idaho 830, 836, 839 P.2d 1244, 1250 (Ct. App.1992). Specifically, the Idaho Court of Appeals held:

This Court has previously held that while a defendant is entitled to be present at sentencing and at resentencing when a prior invalid sentence is corrected, no such right exists on a motion to reduce a sentence. *State v. James*, 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct. App.1986). “Indeed, the decision whether even to conduct a hearing on a Rule 35 motion has always been discretionary with the district court.” *Id.* A trial court abuses its discretion on whether to hold a hearing on a Rule 35 motion when it unduly limits information considered in deciding the motion. *James*, 112 Idaho at 242, 731 P.2d at 237. *Ramirez* has failed to show that the district court unduly limited the available information in this case. *Ramirez* does not even identify what evidence he might have produced at a hearing that he was unable to produce through the affidavits which were submitted.

*Id.* (footnote omitted). Here, Fain has not only not set forth any evidence that could be adduced, Fain has failed to state the basis for the Rule 35 Motion, other than the fact that he did not like the outcome of being sent to prison for his probation violation. The Court cannot be required to guess at what evidence Fain might present in support of his Rule 35 Motion. Because Fain has failed to set forth the basis for his Motion, and because he has completely failed to give any indication of any fact which would support his claim, his Rule 35 Motion must be denied due to those failures.

### **C. FAIN’S MOTION HAS NO MERIT.**

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. *Strand*, 137 Idaho at 463, 50 P.3d at 478; *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, 64 (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. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). This requires the court to 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 Court finds the sentences originally imposed were reasonable. The Court finds the imposition of those sentences on September 27, 2018, was a reasonable decision. Because of Fain’s lengthy criminal history, his history of drinking and driving despite being given prior addiction treatment, this Court strongly felt the only way to keep the community safe while having Fain continue to treat his addiction and mental health condition was to be in a program such as Mental Health Court where he is seen in court every week, where he sees his probation officer every week and where he is tested for drugs and alcohol about three times a week on a random basis. Additionally, the Court

was concerned enough with the risk Fain posed if he were to consume alcohol, the Court required him to have an ankle monitoring bracelet installed on his person. Fain chose to no longer avail himself of that treatment, structure and supervision. Fain chose to cut the bracelet off, get on a plane to San Diego, California, make his way across the United States/Mexico border, and abscond. It was only a couple weeks later when Fain attempted to re-enter to the United States that he was apprehended, taken into custody in San Diego, California, then transported back to this Court. Given the fact that Fain will not abide by this Court's orders, even when his mental health issues are optimally treated, the Court simply cannot have Fain on probation and keep the public safe. The Court's primary responsibility is to protect the public. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (1982). Fain wishes this Court to reconsider its decision on September 27, 2018, imposing his prison sentence. This Court concludes that imposition of Fain's sentences is necessary for the protection of society and the deterrence of Fain and others.

### **III. ORDER.**

**IT IS THEREFORE ORDERED** that Fain's Motion for Reconsideration of Sentence Pursuant to I.C.R. 35 is **DENIED**.

**IT IS FURTHER ORDERED** that the hearing scheduled for December 20, 2018, is **VACATED**.

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

**YOU, MICHAEL FAIN, 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 7<sup>th</sup> day of November, 2018.

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John T. Mitchell, District Judge

**CERTIFICATE OF MAILING**

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

Defense Attorney - Zachary Jones/Amanda Montalvo  
Prosecuting Attorney -

MICHAEL FAIN  
IDOC # 110522

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

**CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY**

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