

STATE OF IDAHO)
County of KOOTENAI)
FILED 11/29/18
AT 4:00 O'clock P.M.
CLERK, DISTRICT COURT
John Hansen
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,)
vs.)
Plaintiff,)
BRIAN ERIC HOLLIS)
DOB: 12/05/1964)
SSN: XXX-XX-5370)
IDOC: 76111)
Defendant.)

Case No. **CRF 2017 13474**
CRF 2017 21259

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

On April 18, 2018, this Court sentenced Brian Eric Hollis (Hollis) as follows:

CRF 2017 13474 – COUNT I – LEWD CONDUCT WITH A MINOR UNDER 16, (a felony), I. C. 18-1508, 19-2520G(2), committed on July 17, 2017 – to the custody of the Idaho State Board of Correction for a fixed term of TWENTY-FIVE (25) years followed by an indeterminate term of LIFE years, for a total term not to exceed LIFE years.

CRF 2017 13474 - COUNT II - SEXUAL EXPLOITATION OF A CHILD, (a felony), I. C. 18-1507(2)(b) committed on July 17, 2017 – to the custody of the Idaho State Board of Correction for a fixed term of FIFTEEN (15) years followed by an indeterminate term of ZERO (0) years, for a total term not to exceed FIFTEEN (15) years.

CRF 2017 21259 – COUNT I - SEXUAL EXPLOITATION OF A CHILD, (a felony), I. C. 18-1507(2)(b) committed on July 7, 2017 – to the custody of the Idaho State Board of Correction for a fixed term of FIFTEEN (15) years followed by an indeterminate term of ZERO (0) years, for a total term not to exceed FIFTEEN (15) years.

CRF 2017 21259 – COUNT II - SEXUAL EXPLOITATION OF A CHILD, (a felony), I. C. 18-1507(2)(b) committed on July 7, 2017 – to the custody of the Idaho State Board of Correction for a fixed term of FIFTEEN (15) years followed by an indeterminate term of ZERO (0) years, for a total term not to exceed FIFTEEN (15) years.

CRF 2017 21259 – COUNT III - SEXUAL EXPLOITATION OF A CHILD, (a felony), I. C. 18-1507(2)(b) committed on July 7, 2017 – to the custody of the Idaho State Board of Correction for a fixed term of FIFTEEN (15) years followed by an indeterminate term of ZERO (0) years, for a total term not to exceed FIFTEEN (15) years.

These sentences run CONCURRENT.

Sentencing Disposition and Notice of Right to Appeal, 2. Pursuant to I.C. §19-2502G, the Court found Hollis to be a “repeat sex offender.” On April 26, 2018, counsel for Hollis, at

the time Anne C. Taylor, timely filed a "Motion for Reconsideration of Sentence Pursuant to I.C.R. 35." It is unknown why the I.C.R. 35 motion filed in each case is not signed or dated by Hollis's counsel. On May 3, 2018, Sean Walsh (Walsh) was substituted for Anne C. Taylor as counsel for Hollis. On July 31, 2018, Walsh filed a Notice of Hearing, scheduling the I.C.R. 35 Motion for hearing on September 20, 2018. Due to a request made by Walsh, that hearing did not occur. On September 26, 2018, Walsh filed a different Notice of Hearing, scheduling the I.C.R. 35 Motion for hearing on November 1, 2018. On October 1, 2018, Walsh filed an Amended Notice of Hearing, scheduling the I.C.R. 35 Motion for hearing on December 4, 2018. It is important to note that at no time did the Court, or its calendar, cause there to be a delay in hearing Hollis's motion.

Hollis bases his motion on "a plea for leniency." Mot. for Recons. of Sentence Pursuant to I.C.R. 35, 1. No additional basis was given. In his Rule 35 Motion, counsel for Hollis requested a hearing. *Id.*

II. ANALYSIS.

For a variety of reasons, this Court has determined that Hollis's Rule 35 Motion must be denied. The Court also determines that a hearing is not necessary.

A. HOLLIS'S MOTION IS TIME BARRED BECAUSE HE UNREASONABLY DELAYED IN BRINGING IT TO A HEARING.

This Court finds the hearing, now scheduled for December 4, 2018, is not reasonably timely. More than seven months have passed from the time Hollis's Rule 35 Motions were filed in each case on April 26, 2018, to the time now set for hearing on December 4, 2018. The Court finds that delay on Hollis's part to be unreasonable. The Idaho Court of Appeals discussed that issue in *State v. Torres*, 107 Idaho 895, 897-98, 693 P.2d 1097, 1099-1100 (Ct. App. 1984):

The State further contends that even if Torres' motion was timely, the district court lost jurisdiction to rule on it after the 120-day period had

expired. Again, we disagree. In the federal system, the 120-day time limit for filing Rule 35 motions is jurisdictional and may not be extended. *United States v. Addonizio*, 442 U.S. 178, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979). However, several federal courts have held that rulings on timely filed motions are not limited to the same 120-day period. The federal district courts are allowed to act on timely motions within a reasonable period after they are filed, even if that period extends beyond 120 days from judgment. See *United States v. Johnson*, 634 F.2d 94 (3rd Cir.1980); *United States v. Stollings*, 516 F.2d 1287 (4th Cir.1975); *United States v. Mendoza*, 565 F.2d 1285 (5th Cir.1978), modified 581 F.2d 89 (1978); *United States v. DeMier*, 671 F.2d 1200 (8th Cir.1982); *United States v. United States District Court*, 509 F.2d 1352 (9th Cir.1975), cert. denied sub nom. *Rosselli v. United States*, 421 U.S. 962, 95 S.Ct. 1949, 44 L.Ed.2d 448 (1975). Recently, the Ninth Circuit summarized the federal interpretation of Rule 35: "This court and other appellate courts have mitigated the arbitrary operation of the Rule by treating the time limit with some flexibility, allowing district courts to retain jurisdiction over timely-filed motions for a 'reasonable time' beyond the deadline." *United States v. Smith*, 650 F.2d 206, 209 (9th Cir.1981) (citations and footnote omitted).

We are persuaded that this approach is better reasoned than the jurisdictional cutoff urged by the State. Therefore, we hold that a district court does not lose jurisdiction to act upon a timely motion under Rule 35 merely because the 120-day period expires before the judge reasonably can consider and act upon the motion. In this case the delay was caused in part by the retirement of the original sentencing judge. We will not visit the consequences of such delay upon Torres.

Hollis unreasonably delayed bringing his Rule 35 Motion to issue by not having this matter heard until December 4, 2018. Accordingly, Hollis's Rule 35 Motion, while timely filed, is dismissed for not being timely brought to issue. As mentioned above, the failure to have this motion brought to issue is not the fault of the Court.

B. HOLLIS HAS NOT SET FORTH A VALID BASIS FOR HIS MOTION, NOR HAS HOLLIS 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.2nd 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 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 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, counsel for Hollis has failed to set forth evidence that could be adduced at present. Essentially, Hollis has chosen to file an I.C.R. 35 Motion, but subsequently he also chose to untimely notice it up for hearing, and even with that unreasonable delay in bringing it to hearing, Hollis has never stated what facts or any evidence he might have to support his motion. There are no facts which support Hollis' I.C.R. 35 Motion.

As mentioned above, Hollis bases his motion on "a plea for leniency." Mot. for Recons. of Sentence Pursuant to I.C.R. 35, 1. 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 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 Hollis’s sentences imposed on April 18, 2018, were reasonable. On the date of sentencing, the Court explained to Hollis how difficult it was for the Court to impose anything less than a fixed life sentence given the compulsion Hollis has shown for sexually-deviant actions, and that the only reason the Court was imposing a fixed twenty-five year sentence and indeterminate life instead of a fixed life sentence, was an act of mercy. Hollis, who was already a registered sex offender, was discovered by his wife to have pornographic images of his two-year-old granddaughter on his cell phone. Presentence Report 3. Hollis denied penetrating his granddaughter’s vagina with his finger (*Id.*), but the photographs clearly show otherwise and the Court, at sentencing, told Hollis that the Court so found. Previously, on November 10, 2004, Hollis was sentenced to a ten-year prison term for Lewd Conduct with a Minor. The victim in that case was

Hollis's daughter. The victim, age thirteen at the time, reported that in 1996, her father pushed her shirt up and started sucking and nibbling on her nipples for a few minutes. *Id.*

8. This, among other reasons, is why the court, at the April 18, 2018, sentencing hearing, found Hollis's sexual behavior to be compulsive--something he could not control. At sentencing, this Court was well aware of the fact that Hollis was 54 years old at that time, and that the twenty-five-year fixed sentence will result in being eligible for parole about 23.7 years from now (given credit for time served), when Hollis would be about age 88. The Court finds that to be an appropriate age to be considered for release, and the Court finds that to be an appropriate amount of time for his fixed sentences.

The sentences imposed on April 18, 2016, were and are appropriate sentences given Hollis's social history, his deviant sexual criminal history, the facts of his prior sexual crime and the facts of the crimes for which sentences were imposed on April 18, 2018. A lesser sentence would depreciate the seriousness of Hollis's crimes. This Court concludes that the sentence imposed was and is necessary for the protection of society, protection of Hollis's current and past victims, protection of other potential victims and the deterrence of Hollis and others.

C. NO HEARING IS NEEDED.

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 Pursuant to I.C.R. 35, the Court has re-reviewed the minutes of the April 18, 2018, sentencing hearing, and has re-reviewed the pre-sentence report and all other materials reviewed at sentencing. 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.

III. ORDER.

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

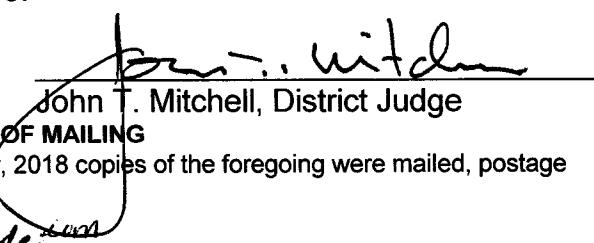
IT IS FURTHER ORDERED the hearing scheduled for December 4, 2018, is **VACATED**.

NOTICE OF RIGHT TO APPEAL

YOU, BRIAN ERIC HOLLIS, 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.

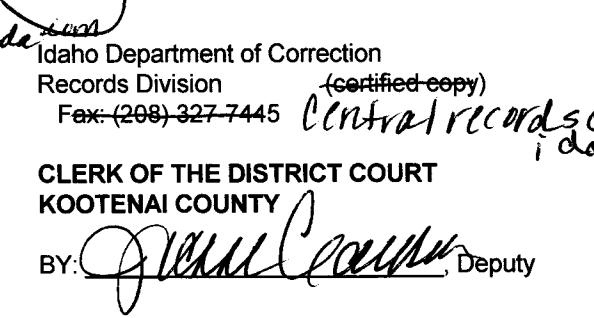
DATED this 29th day of November, 2018.


John T. Mitchell, District Judge

I hereby certify that on the 29th day of November, 2018 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Sean Walsh *jessica@langroupdc.com*
Prosecuting Attorney – Barry McHugh
BRIAN ERIC HOLLIS
IDOC # 76111
Sean Walsh

*Kcpcourts
chegov.us.
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