

consumed alcohol and again tested positive for methamphetamine. Corey admitted these allegations, and on June 12, 2002, his probation was continued and he was ordered to begin the Alcoholic Rehabilitation Association program for individuals with dual diagnosis (closed head injury and addiction). Following the completion of that program, Corey was compliant until about February 2003. On November 12, 2003, a Report of Violation was filed alleging he had committed a new crime of possession of methamphetamine on November 4, 2003 (CRF 2003 23415), that he had failed to appear in a reckless driving case, failed to report for urinalysis testing on several occasions beginning in February 2003, failed to report to his probation officer on several occasions beginning in May 2003, and admitted to using marijuana in May 2003 and methamphetamine in November 2003. He pled guilty to possession of methamphetamine in CRF 2003 23415, and on February 6, 2004, was sentenced as follows:

CRF 2003 23415 POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE), a felony committed on November 4, 2003 – to the custody of the Idaho State Board of Correction for a fixed term of TWO (2) years followed by an indeterminate term of FIVE (5) years, for a total term not to exceed SEVEN (7) years.

His sentence was imposed, and he was sent to prison on a retained jurisdiction program. Corey's probation was revoked in CRF 2001 9370 and Corey was likewise sent to prison on a retained jurisdiction program. Both sentences ran concurrent. On July 29, 2004, having successfully completed his retained jurisdiction program, Corey returned from prison and was placed on probation for four years. On February 8, 2005, a Report of Violation was filed in both cases dated February 4, 2005, alleging Corey failed to comply with treatment, that he admitted to using marijuana, methamphetamine, drove without privileges and left the scene of a property damage accident. Corey admitted those

violations, and on February 17, 2005 Corey was ordered to participate in the Kootenai County Mental Health Drug Court program. Corey made progress within that program, but on October 10, 2005 Corey committed the crime of petit theft and unlawful entry. Once that case resolved in a plea, Corey was terminated from the Kootenai County Mental Health Drug Court program. In that termination decision the entire Kootenai County Mental Health Drug Court "Team", composed of several individuals (including Corey's probation officer, a special deputy prosecutor, public defender, three psychosocial rehabilitations professionals, a Kootenai County Sheriff Sergeant, a Kootenai County Court Clerk, a vocational rehabilitation specialist, a representative from the National Alliance of the Mentally Ill, the director of the Bipolar Support Group, and a representative of Child and Protective Services) recommended the Therapeutic Community. Order on Mental Health Drug Court Hearing dated June 1, 2006, p. 1. A Report of Violation dated June 7, 2006, was filed on June 16, 2006, by his probation officer. Corey admitted to violating his probation, and on July 27, 2006, Corey had his probation revoked and sentence imposed in both cases. In sending him to prison, this Court recommended the Therapeutic Community to address Corey's criminal thinking and addictions.

On August 3, 2006, Corey timely filed a Motion for Reconsideration of Sentence Pursuant to I.C.R. 35. Accordingly, Corey's Rule 35 Motion is within the fourteen-day time period and is timely. The basis for Corey's Rule 35 Motions was "a plea for leniency". Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, p. 1. Corey also filed an appeal to the Idaho Supreme Court on August 3, 2006, which appeal was stayed by order of the Idaho Supreme Court on January 29, 2007 pending this Court's resolution of the I.C.R. 35 Motion.

No hearing was requested on the I.C.R. 35 Motion until February 27, 2007, when

Corey noticed his I.C.R. 35 Motion for hearing on March 28, 2007. The hearing was held on March 28, 2007, but the State of Idaho Department of Correction witnesses called by Corey were not available to give testimony telephonically. The hearing was re-scheduled for May 14, 2007. On March 29, 2007, Corey filed an Amended Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, specifying his motion was still a "plea for leniency" but specifying the relief sought that "the Court suspend the balance of his prison sentences in both of these cases and place him on supervised probation", or in the alternative, modify the fixed portion of the sentence in CRF 2003 23415 to the time he has already served. Amended Motion for Reconsideration of Sentences, p. 1.

On May 14, 2007, a hearing was held. At that hearing, Ronald McCoy, psychosocial rehabilitation specialist with the State of Idaho Department of Correction testified that the Therapeutic Community was not in his case plan and had never been in his case plan. McCoy could not tell the reason why the Idaho Department of Correction had made that determination, but thought it might be due to Corey's closed head injury or due to his bi-polar disorder. McCoy thought Corey would do well on supervised probation. Corey also testified. Corey stated that he should finish Cognitive Self Change by his parole date of August 3, 2007. Corey testified that he had not been given his prescribed medication (Lemictal) for his bi-polar disorder, and that the Idaho Department of Correction had substituted Lithium instead. Corey testified that he has contacted Powder Basin Associates in Coeur d'Alene, Idaho, regarding psychosocial rehabilitation services if placed on probation now or parole in the future. Finally, Corey testified that he is willing to return to the Kootenai County Mental Health Drug Court program if his I.C.R. 35 Motion were granted, because even though he was terminated from that program, it was "the best I've done in fifteen years." Following the May 14, 2007, hearing, the matter was taken under

advisement. On May 15, 2007, the State filed “State’s Brief in Opposition to Defendant’s Rule 35 Motion”. On May 17, 2007, the Kootenai County Mental Health Drug Court Screening Team met and approved his eligibility for the Kootenai County Mental Health Drug Court program as a term of his probation or parole.

II. ANALYSIS.

The matter is now at issue. The Court has reviewed the filed “State’s Brief in Opposition to Defendant’s Rule 35 Motion”. Corey has not filed a brief in response. The State of Idaho argues Corey did not set forth any “grounds for the motion” in his initial I.C.R. 35 motion or his amended motion. The State of Idaho argues the purpose for the 14-day time limit under I.C.R. 35 is to “avoid just these types of scenarios while allowing courts to resolve issues of leniency expeditiously before defendants went into the custody of the Department of Corrections [sic].” State’s Brief in Opposition to Defendant’s Rule 35 Motion, p. 2. The State cites *State v. Tranmer*, 135 Idaho 614, 21 P.3d 936 (Ct.App. 2001) and *State v. Maggard*, 126 Idaho 477, 886 P.2d 782 (Ct.App. 1994), as support for its argument. The Court has reviewed both cases and is not persuaded. Nowhere in either case is it stated that the purpose of the time period within which to file a Rule 35 motion is “to resolve issues of leniency expeditiously before defendants went into the custody of the Department of Correction”, as argued by the State. Such an argument has no merit, as once the Court’s sentencing decision is made, a defendant is in the custody of the State of Idaho Department of Correction, even though he or she may not be transported to a state facility immediately. In any event, Corey has met the fourteen-day time period.

Tranmer is not on point as the district court in that case, rather than rule on the Rule 35 motion filed in June 1999, “...issued an order staying consideration of the motion for a

period not to exceed one year ‘to require a showing from the defendant as to his or her desire and efforts, over a period of time, to effect change which would warrant the Court’s reconsidering and/or reduction of the original sentence.’” 135 Idaho at 615, 21 P.3d at 937. At the Rule 35 hearing, it was obvious the district judge was in the habit of this practice of waiting a year, and granted Tranmer’s Rule 35 motion reducing his sentence. *Id.*

The obvious differences between *Tranmer* and Corey’s case are: 1) The district court did not stay consideration of the motion for a year, 2) Corey is not seeking any relief while he is serving the indeterminate portion of his sentence, 3) Corey is not seeking a reduction in his sentence, but rather an order placing him back on probation, and 4) he seeks a response to the fact that he will not be allowed to participate in the Therapeutic Community not due to his conduct in prison, but due to his closed head injury and/or his bipolar disorder. The latter two distinctions show Corey is not attempting to “usurp the responsibilities of the parole officials by acting on the motion in light of the movant’s conduct while in prison”, (135 Idaho at 616, 21 P.3d at 938), nor is Corey asking this Court to “infringe upon the executive duties granted to the Commission of Pardons and Parole.” 135 Idaho at 617, 21 P.3d at 939. If Corey’s relief is granted and he is placed on probation and violates his probation again and is placed back into prison, the Commission of Pardons and Parole still has all the ability to keep Corey in prison until he finishes the indeterminate portion of his sentence. If Corey’s relief is granted, it is only granted due to the reality that the ONLY program this Court asked the State of Idaho Department of Correction to provide, that being the Therapeutic Community, will in fact not be provided Corey, due to no fault of his own. This has nothing to do with Corey’s performance in prison. If this is not a “breach of contract” by the State of Idaho Department of Correction with the Court, it is at the very least the Department of Correction’s “inability to perform” the paramount **written**

term requested by the District Court. The District Court's July 27, 2006 "Probation Violation Disposition and Notice of Right to Appeal" reads in pertinent part:

IT IS FURTHER ORDERED that **KRISTOPHER SHANE COREY** is committed to the custody of the Idaho State Board of Correction on the date of the disposition hearing, July 27, 2006. **IT IS STRONGLY RECOMMENDED THAT YOU PARTICIPATE IN THE "THERAPEUTIC COMMUNITY" PROGRAM TO ADDRESS YOUR ADDICTION TO METHAMPHETAMINE AND OTHER CONTROLLED SUBSTANCES, AND THAT YOU TAKE WHATEVER COGNITIVE RESTRUCTURING PROGRAMS ARE AVAILABLE.**

The Department of Correction is encouraged to 1) get Mr. Corey involved and through the Therapeutic Community as soon as possible, and 2) treat him for his mental health conditions appropriately. Current medications include: Lemictal 200 mg 1x/day in evenings.

THE STATE OF IDAHO COMMISSION OF PARDONS AND PAROLE IS STRONGLY ENCOURAGED NOT TO CONSIDER YOU ELIGIBLE FOR PAROLE UNTIL HE HAS SUCCESSFULLY COMPLETED THE "THERAPEUTIC COMMUNITY" PROGRAM.

The State of Idaho Commission of Pardons and Parole is also encouraged to consider implementation of the Kootenai County Mental Health Drug Court as a transitional program for Mr. Corey on Parole.

July 27, 2006 "Probation Violation Disposition and Notice of Right to Appeal", p. 2.

(emphasis in original). Sentence was imposed on Corey July 27, 2006, due to Corey's probation violations, but the ONLY reason sentence was imposed as opposed to the other options available to the Court on July 27, 2006 (another retained, a reduction in sentence, continued probation), was due to the Court's recommendation that the Therapeutic Community was essential for Corey's addiction and criminal thinking and the Idaho Department of Correction assurances to all district judges that they try their best to comply with the recommendations of the district court judges. The State of Idaho Department of Correction was unable to perform that requested recommendation. Not only was the Therapeutic Community the paramount request by the District Court, but it was the paramount recommendation by the Kootenai County Mental Health Drug Court team.

The *Tranmer* decision held “any delay which allows the trial court to infringe upon the duties of the parole board is per se unreasonable”, and “A clear indication of infringement occurs when a district court reduces a sentence while the defendant is serving the indeterminate portion of his sentence.” 135 Idaho at 617, 21 P.3d at 939. Those factors are simply not present in Corey’s case. Nor is this Court’s decision in Corey’s case based upon any conduct by Corey while in prison, which is what *Tranmer* and the cases it cited (*State v. Simpson*, 131 Idaho 196, 953 P.2d 636 (Ct.App. 1998), and *State v. Chapman*, 121 Idaho 351, 825 P.2d 74 (1992)) primarily concern.

The Department of Correction’s next “inability to perform” a **written** term requested by the District Court is the State of Idaho Department of Correction’s refusal to provide Corey with his proper medications. Corey’s order specifically states his “current medications include: Lemictal 200 mg 1x/day in evenings”, and that the Department of Correction was “encouraged to treat him for his mental health conditions appropriately.” Corey testified at his May 14, 2007, hearing, without impeachment, that he was instead being medicated with Lithium. This is in direct contravention of the District Court’s request in the July 27, 2006 “Probation Violation Disposition and Notice of Right to Appeal”, p. 2. This Court made that request after having observed Corey in the Kootenai County Mental Health Drug Court for a period of sixteen months. While claims of deprivation of rehabilitative treatment and attacks on the conditions of confinement are more properly addressed in post-conviction or *habeas corpus* proceedings (*State v. Sherman*, 120 Idaho 464, 816 P.2d 1021 (Ct.App. 1991), *citing State v. Garza*, 115 Idaho 32, 34, 764 P.2d 109, 111 (Ct.App. 1988) and *State v. Sommerfield*, 116 Idaho 518, 520, 777 P.2d 740, 742), Corey is not prohibited from making his request via an I.C.R. 35 motion. The preference for post-conviction proceedings or *habeas corpus* proceedings is to develop a record. *Id.*

The record was developed in the May 14, 2007 hearing, so that concern was met. This Court finds, as a matter of law, that a Rule 35 motion is the appropriate vehicle when it is the Court's own conditions (medication and Therapeutic Community) that were disregarded by the Department of Correction. There is no judicial economy served by having some other judge in a separate litigation, determine what this Court meant when it requested the Idaho Department of Correction to give Corey his correct medication and provide him with the Therapeutic Community. This Court finds, as a matter of fact, that the State of Idaho Department of Correction's substitution of Lithium and abolition of Lemictal is not appropriate treatment of Corey's mental health condition. Corey had a current prescription of Lemictal on July 27, 2006, which was managing his bi-polar disorder appropriately. This Court is convinced Corey's commission of the burglary in October 2005 was not connected to his bipolar disorder as it was being well managed by Lemictal and counseling. This Court is convinced that Corey's commission of the burglary was due to his well entrenched habit of criminal thinking (which is precisely what the Therapeutic Community is designed to assist in correcting) and the impulsivity caused by his documented closed head injury.

Finally, the State of Idaho Parole Commission will eventually find itself in a situation where it has the "inability to perform" a written condition by the District Court. This Court requested that the State of Idaho Parole Commission "NOT TO CONSIDER YOU ELIGIBLE FOR PAROLE UNTIL HE HAS SUCCESSFULLY COMPLETED THE "THERAPEUTIC COMMUNITY" PROGRAM." July 27, 2006, Probation Violation Disposition and Notice of Right to Appeal, p. 2. If Corey will never get into the Therapeutic Community, and if the State of Idaho Parole Commission were to oblige the District Court's recommendation, Corey would not be released from his sentence until he completes the indeterminate portion of his sentence more than three years from now. That would result in

the worst of all outcomes. Corey was sent to prison to take advantage of the Therapeutic Community. He has found himself in a situation not of his own making where he cannot get that program, and as a result, could now stay for all five years of his sentence, with his bipolar disorder managed inappropriately, not getting the programming he needs, to be released years from now without supervision (if he completes his sentence), out in society with a five-year history of his mental illness not being managed appropriately. This Court finds that by granting Corey's Rule 35 Motion it is not usurping the State of Idaho Commission of Pardon and Parole's authority. Instead, it is avoiding placing the Commission in the position of either: a) disregarding the Court's recommendation, or b) following the Court's recommendation which would keep Corey in a prison which is inappropriately managing his mental health condition for an additional three years and releasing him without supervision.

Finally, Corey testified in his May 14, 2007, hearing that he wanted to come back to the Kootenai County Mental Health Drug Court. After that hearing he was approved for re-entry into that program by the Kootenai County Mental Health Drug Court Screening Team. There is absolutely no doubt in this Court's mind, nor apparently in the collective judgment of the Kootenai County Mental Health Drug Court Screening Team, that since Corey is not going to get into the Therapeutic Community, the best placement for him given his mental illness, his addiction, closed head injury and long standing pattern of criminal thinking is the Mental Health Drug Court program. It is possible to have Corey participate in the Mental Health Court while on probation, but the mechanics of such a procedure are still being worked out. Granting the Rule 35 Motion gives the best result. It gets Corey out of a prison setting where he is not getting the intended programming and where his mental illness is being inappropriately managed. It accomplishes this today, not three or more

months from now when he is parole eligible, or worse yet, three or more years from now when he has completed his sentence. The option of prison is still available to the Court if he were to not succeed in the Mental Health Drug Court program this time around. The Department of Correction is overcrowded in its prison facilities, and since it is not providing the Therapeutic Community Corey needs, it is essentially warehousing Corey. The Commission of Pardons and Parole is not put in a Hobson's choice of following the Court's recommendations and continuing to warehouse Corey or disregarding the Court's recommendations and placing him on parole.

The other case cited by the State is *State v. Maggard*, 126 Idaho 477, 886 P.2d 782 (Ct.App. 1994). State's Brief in Opposition to Defendant's Rule 35 Motion, p. 2. Similar to *Tranmer* and dissimilar to the present case, the trial court in *Maggard* took it upon itself to take the Rule 35 motion under advisement for six months. 126 Idaho at 478, 886 P.2d at 783. In the present case, the Court has not caused any delay. The Court has not taken any matter under advisement (other than the few days from May 14, 2007 when the matter was argued to the date below) in this case. Citing *State v. Chapman*, 121 Idaho 351, 825 P.2d 74 (1992), in which a delay of thirty-two months caused the trial court to overstep its jurisdictional boundaries, the Court of Appeals in *Maggard* held that the delay of six months *without explanation* caused the trial court to lose jurisdiction. 126 Idaho at 479, 886 P.2d at 784. Key to the Court of Appeals decision was the following: "There is no indication in the record that Maggard requested additional time to supplement the record or that he intended to submit any additional evidence after the motion was filed. Neither the state nor Maggard requested that the motion be held in abeyance..." *Id.* In the present case, Corey's counsel specifically wrote: "Counsel requests that a hearing not be scheduled at this time." The State did not object to waiting, and it could have done so. The State did not

notice the matter up for hearing, and it could have done so. Certainly, the Court did nothing to delay the hearing on this motion. In *State v. Nickerson*, 123 Idaho 971, 974, 855 P.3d 56, 59 (Ct.App. 1993), which was cited in *Tranmer* 135 Idaho at 617, 21 P.3d at 939, the fact that the prosecution agreed to let Nickerson's appeal proceed before the Rule 35 Motion was ruled upon ("He was joined in this process by the deputy prosecuting attorney"), was noted by the Idaho Court of Appeals. While the prosecution did not join in Corey's request that "a hearing not be scheduled at this time", the prosecution certainly did not object to that request.

The District Court's decision would have been different on July 27, 2006, had the Court known Corey: 1) would not get into the Therapeutic Community for reasons beyond his control; and 2) would not be given the medications he was proven to need (Lamictal) during the time he was observed by this Court while he was in the Kootenai County Mental Health Drug Court program. The Court specified each of these conditions in this Court's July 27, 2006, Judgment and Sentence. Had the Court known **either** condition would not be met, the Court would not have imposed sentence on Corey. There is no doubt in this Court's mind that if the Court had known that **both** of these conditions would be ignored by the Idaho Department of Correction, sentence would not have been imposed. All reasons for imposing sentence, that being having his mental illness managed in an appropriate manner while at the same time obtaining the Therapeutic Community, have vanished. The sentencing considerations required by *State v. Toolhill*, 103 Idaho 565, 650 P.2d 707 (Ct.App. 1982) ("(1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment or retribution for wrongdoing", the primary consideration being the protection of society), were not met given what has unfolded since July 27, 2005, and they are not met by denying Corey's Rule 35 Motion.

That would not be the case had the Department of Correction appropriately managed his mental health condition. Had the Department of Correction provided Corey with Lamictal, then it could be said that society was being protected, Corey and the general public were being deterred and Corey was being punished. That is because when Corey was released, his mental health condition would have at least been treated appropriately. Given the appropriate mental health treatment but still not being allowed into the Therapeutic Community would still thwart the “possibility of rehabilitation” considerations, but at least the other considerations would have been met. However, since the Department of Correction has chosen to inappropriately treat Corey’s mental health condition, continued incarceration serves only one of the *Toolhill* considerations...Corey would have been *punished*. None of the other three *Toolhill* considerations would have been met, especially the first and foremost. **First**, Society is not being protected because eventually Corey will be released, and when he is released, it will be with the wrong medications for his mental illness. Corey will be mentally unstable at worst, and sub-optimally managed at best. If he remains in custody for his entire indeterminate sentence, not only will he be released unstable or sub-optimally managed, but he will be released entirely without supervision. **Second**, Corey will not be deterred, as he would be released in an unstable condition and not having been given the very treatment (the Therapeutic Community) that could address his criminal thinking and impulsivity. **Third**, absolutely no rehabilitation will have occurred.

On the other hand, by granting Corey’s Rule 35 Motion, not only are all the *Toolhill* factors met (even punishment, because Corey can still be sent *back* to prison), but it would actually be easier for Corey to remain in prison for at least another three months, be released on parole, take the chance that the Parole Commission not require him to enter

into the Mental Health Drug Court Program, and try his chances on simple parole. By granting Corey's Rule 35 Motion, he is placed on supervised probation, he is **forced** into the Mental Health Drug Court program, he must successfully complete that program and if he fails, prison awaits him again. The fact that it would be "easier" for Corey to remain in prison was discussed at the May 14, 2007, hearing on Corey's Rule 35 Motion, and Corey's attorney indicated that it was against his advice that Corey proceed on his Rule 35 Motion.

In a Rule 35 Motion, a defendant may show that the sentence imposed, while not excessive when pronounced, is excessive in view of new or additional information. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63 (Ct. App. 1987). What Corey has shown is not that the sentence imposed was excessive when pronounced, but Corey has shown that the pronouncement of his sentences on July 27, 2006, was excessive, given the Court's recommendations to the Department of Correction and the Parole Commission, and based on the new and additional information that Corey will not get into the Therapeutic Community and that he has not had his mental health condition treated appropriately.

III. CONCLUSION AND ORDER.

The imposition of sentence on July 27, 2006, was excessive given the Court's recommendations and expectations of the Department of Correction and the additional information that Corey will not get into the Therapeutic Community and has not had his mental health condition treated appropriately.

IT IS THEREFORE ORDERED that Corey's I.C.R. 35 Motion be and the same hereby is **GRANTED**. the July 27, 2006 decision of this Court revoking Corey's

probation in both cases is **RESCINDED**, and the July 27, 2007 decision committing Corey to the custody of the State of Idaho Department of Correction is **RESCINDED**.

IT IS FURTHER ORDERED that Corey be transported to the Kootenai County Jail, where he shall be held without bond until the next available Kootenai County Mental Health Drug Court (every Thursday at 8:00 a.m. in Courtroom # 8, Kootenai County Justice Building), at which time his terms and conditions of probation shall be imposed.

NOTICE OF RIGHT TO APPEAL

YOU, Corey, 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 22nd day of May, 2007.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of May, 2007 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Val Sielgel
Prosecuting Attorney – Donna Gardner
KRISTOPHER SHANE COREY
IDOC # 63699
Probation & Parole – Marcy Black
State of Idaho Commission of Pardons and Parole,
Olivia Craven, Director

Idaho Department of Correction
Records Division (certified copy)
Fax: (208) 327-7445
**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy