

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. )  
)  
**DAVID ALLEN OPPELT** )  
DOB: 03/19/1956 )  
SSN: 518-70-2704 )  
IDOC: 89477 )  
)  
Defendant. )

Case No. **CRF 2008 3128**

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

On June 12, 2008, David Allen Oppelt (Oppelt) was sentenced as follows:

**BURGLARY**, (a felony), Idaho Code § I.C. 18-1401, 18-204, committed on February 16, 2008 – to the custody of the Idaho State Board of Correction for a fixed term of ONE (1) year followed by an indeterminate term of TWO (2) years, for a total term not to exceed THREE (3) years.

On that date the Court sent Oppelt on a retained jurisdiction, requesting “A New Direction” programming (chemical dependency programming), for his addiction to heroin and marijuana.

On November 5, 2008, a jurisdictional review hearing was held. At the conclusion of that hearing, this Court relinquished its jurisdiction and imposed the above sentence. The Court also recommended the Therapeutic Community (chemical dependency programming) for his addictions and for cognitive restructuring. The Court decided to relinquish jurisdiction based upon Oppelt’s poor performance on the retained jurisdiction program. The Idaho Department of Correction recommended relinquishment of jurisdiction, the deputy prosecutor recommended relinquishment of jurisdiction, and given

his non attendance in programming while on the retained jurisdiction and his failure to develop any kind of probation plan, that was the only logical decision for this Court. The Court at that time gave Oppelt credit for 219 days time served.

On December 2, 2009, Oppelt (through his then Court appointed Attorney, Linda Payne) filed the instant I.C.R. 35 Motion requesting that:

1. Defendant's medical condition and poor health: arthritis in every part of his body, bone spurs which require special shoes, osteoporosis in his back, in a wheelchair, can barely walk, on prescription medications, and when in transport defendant gets all wacked out because of failure to adequately medicate: high blood pressure, bleeding ulcers.
2. Prison conditions: hard for him to see a doctor, it takes months to get an appointment, needs to see a specialist for his feet (shoes), is still wearing his shower shoes he has had since June, 2008, extensive walking required while in prison, overcrowding and all of the problems that entails.

Rule 35 Motion for Leniency, p. 1. Oppelt bases his request as a plea for leniency. *Id.*

In that motion, Oppelt requested oral argument, a hearing. *Id.*, p. 2. However, Oppelt's counsel failed to notice up such a hearing.

On December 17, 2008, Oppelt's counsel was switched from Conflict Public Defender Linda Payne to Conflict Public Defender Jed Nixon. It has been nearly nine months since the motion was filed, yet no hearing has been requested. Because no hearing was noticed up, the file did not come to the Court's attention until this Court received Oppelt's letter dated August 24, 2009, in which Oppelt inquired as to the status of his motion. Even though a hearing was requested, 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). The Court has reviewed the Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, the Court minutes and the pre-sentence report. 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.

A motion to reduce sentence is a motion for leniency. *State v. Strand*, 137 Idaho 457, 50 P.3d 472 (2002). The decision to grant or deny leniency is left to the sound discretion of the court. *Id.*

A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court. ... Such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe....

\* \* \*

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. (Citations omitted) *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63 (Ct. App. 1987).

*See also State v. Adams*, 137 Idaho 275, 47 P.3d 778 (Ct.App. 2002).

The sentence imposed on June 12, 2008, was and is an appropriate sentence given 's social and criminal history and the crime(s) for which sentence was imposed. At the jurisdictional review, this Court noted that Oppelt's 27 year long criminal record was "frightening". Oppelt was given the opportunity for probation via a retained jurisdiction, and made no effort to perform well during that program. The instant offense was a burglary involving nearly seven thousand dollars of property. A lesser sentence would depreciate the seriousness of Oppelt's crimes. This Court concludes the sentence imposed was and is necessary for the protection of society and the deterrence of and others.

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

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

**YOU, , 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 11<sup>th</sup> day of September, 2009.

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John T. Mitchell, District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of September, 2009, copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Jed Nixon  
Prosecuting Attorney -

DAVID ALLEN OPPELT  
IDOC # 89477  
ICC M-16-B  
P. O. Box 70010  
Boise, ID 83707

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

**CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY**

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