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State v. Hogan Appellant's Brief Dckt. 45303

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 45303 & 45304
Plaintiff-Respondent,)	
)	ADA COUNTY NOS. CR-FE-2016-7770 &
)	CR01-17-04686
v.)	
)	
TODD AUSTIN HOGAN,)	APPELLANT’S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Cases¹

In July 2017, following Mr. Hogan’s guilty plea to one count of possession of a controlled substance, the district court sentenced Mr. Hogan to a three year fixed term. (Case No. CR-FE-2016-7770.) Two weeks later, as a result of Mr. Hogan’s *Alford*² pleas to one count of burglary and one count of forgery, a separate district court sentenced Mr. Hogan to one and one-half years fixed on each count, concurrent, to be served consecutive to the possession case. (Case

¹ Mr. Hogan has simultaneously filed a Motion to Consolidate because the circumstances and arguments are similar.

² *North Carolina v. Alford*, 400 U.S. 25 (1970).

No. CR01-17-4686.) On appeal, Mr. Hogan asserts the district courts abused their discretion when imposing an excessive sentence and when denying his Rule 35 motions.

Statement of the Facts and Course of Proceedings

In December of 2015, Mr. Hogan was released on parole. For several months, he successfully stayed out of trouble, got a job and abided by his rules of supervision. (Presentence Investigation Report (*hereinafter*, PSI), pp.125-132.)³ On June 16, 2016, while he was at the residence of an associate, parole officers arrived to conduct a routine parole search. Mr. Hogan was contacted, detained, and found in possession of controlled substances and several syringes. (PSI, p.3.) When questioned by the officers, he admitted possessing the contraband as well as his intention to use drugs. (PSI, pp.3-4.) He was charged with two counts of Possession of a Controlled Substance, in violation of I.C. § 37-2732(c) and one count of Possession of Drug Paraphernalia, in violation of I.C. § 37-2734A. (R. 1, p.35) (Case No. CR FE 2016 000770.)⁴ While the first case was pending, he was arrested. (R. 2, p.11.)

In the fall of 2016, Mr. Hogan attempted to cash a check he received from a party who owed him money. The check was bogus because the party who wrote him the check was not the rightful checking account owner; rather, the account owner had previously been a victim of theft. (Tr. 2, p.13, Ls.23-25, p.14, Ls.1-5.) Mr. Hogan was charged with two counts of Grand Theft in violation of I.C. § 18-2403(1) and three counts of Burglary, in violation of I.C. § 18-1401. (R. 2,

³ When referencing the PSI report, Mr. Hogan refers to the June 12, 2017, report prepared for sentencing in Case One, No. CR-FE-2016-7770, which was also relied upon by the district court in Case Two, No. CR01-17-4686. It contains 635 pages and includes several documents, including a GAIN-I, Dr. Chad Sombke's Psychological Evaluation, and several years of notes from IDOC officials.

⁴ Based upon the consolidation, when referring to the record in Case One, Mr. Hogan cites to "R. 1," and when referring to the transcript in Case One, Mr. Hogan cites to "Tr. 1." Likewise, when referring to Case Two, he cites to "R. 2" and "Tr. 2."

pp.46-47.) Without conceding he knew the check was bogus at the time, Mr. Hogan nonetheless entered *Alford* pleas to the charges because it was likely a jury could find he knew or should have known he was not entitled to the payment for the same. (Tr. 2, p.38, Ls.17-23) (Case No. CR01-17-4686.) Although Mr. Hogan entered his plea to the second case with an agreement that the first judge sentence him on both cases, for unknown reasons, he was sentenced separately, and by different judges. (Tr. 2, p.6, Ls.19-25.) Sentencing on both matters took place later that summer. (Tr. 1, p.97; Tr. 2, p.77.)

Mr. Hogan was sentenced on Case One on July 10, 2017. (Tr. 1, p.97.) The prosecution sought an aggregate seven year term, with five years fixed. (Tr. 1, p.23, Ls.22-25.) Mr. Hogan, through counsel, sought a rider, followed by treatment in the Boise Rescue Mission's River of Life treatment program. (Tr. 1, p.32, Ls.22-25.) In the alternative, he sought one and one-half years fixed. (Tr. 1, p.34, Ls.9-13.) The district court rejected probation and retained jurisdiction, imposing a three year fixed term. (R. 1, pp.97-100.) During sentencing on Case Two, Mr. Hogan made a similar plea, requesting a rider for evaluative purposes or alternatively a commutation of the sentence, or six years indeterminate, concurrent. (Tr. 2, p.53, Ls.15-25; p.54, Ls.15-21.) The district court sentenced him to one and one-half years on each count, concurrent with each other but consecutive to Case One. (R. 2, pp.82-85.) Mr. Hogan filed timely appeals in both cases. (R. 1, pp.107-108; R. 2, pp.86-86.) He also filed a timely Rule 35 motion in each case. (R. 1, p.112; R. 2, p.91.)⁵

Mr. Hogan filed virtually identical Rule 35 motions on September 18, 2017, in both cases, seeking a reduction of his sentences to a rider followed by treatment through the Boise

⁵ Mr. Hogan simultaneously files a Motion to Augment the record in Case One, No. CR-FE-2016-7770, which includes Mr. Hogan's Rule 35 motion with supporting documents, as well as the court's November 22, 2017, Order denying relief.

Rescue Mission. (R. 1, p.121; R. 2, p.100.) Each Rule 35 motion contained the same attachments, including a letter from Mr. Hogan, his IDOC restrictive housing order dated June 14, 2017, a certificate of appreciation from IDOC for positive behavior, Dr. Sombke's report, a letter from River of Life, Boise Rescue Mission dated August 22, 2017 (indicating Mr. Hogan can begin the intake process), and a multi-page document explaining the Rescue Mission's New Life Program. (R. 1, pp.112-155; R. 2, pp.91-134.)

In both Case One and Case Two, the district courts denied the motion upon the grounds that the new information was similar in nature to what was presented at the original sentencing hearing, and, further, did not demonstrate the sentence was excessive. (R. 1, p.146.) Mr. Hogan timely appealed the Rule 35 denials.

ISSUES

- I. Did the district court in Case One abuse its discretion in sentencing Mr. Hogan to three years determinate by failing to consider Mr. Hogan's sentence as a whole, and failing to properly weigh the mitigating factors? Likewise, did the district court in Case Two abuse its discretion in sentencing Mr. Hogan to one and one-half years determinate, consecutive to Case One, by failing to consider Mr. Hogan's sentence as a whole, and failing to properly weigh the mitigating factors?
- II. Did the district courts in Case One and Case Two abuse their discretion in denying Mr. Hogan's Rule 35 motions, determining Mr. Hogan's sentence, as a whole, was not excessive?

ARGUMENT

I.

The District Courts Abused Their Discretion By Imposing An Excessive Sentence Under Any Reasonable View Of The Facts

When determining whether a district court abused its discretion at sentencing, the appellate court conducts a “multi-tiered inquiry,” considering: “(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.” *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989), citing *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987). Upon review, the court independently reviews the “record on appeal, having due regard for the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Strand*, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002). A sentence is reasonable if at the time of imposition it appears necessary to achieve “the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to the given case.” *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Reasonableness also “implies that a term of confinement should be tailored to the purposes for which the sentence is imposed.” *Id.* at 568.

Mr. Hogan’s three year determinate term, his consecutive one and one-half year terms, and his sentence as a whole, are all unreasonable and excessive because they are not tailored to meet the goals of sentencing, and the district courts failed to properly weigh and consider the mitigating factors: Mr. Hogan’s acceptance of responsibility, his mental health and substance

abuse issues, his proven track record of amenability and willingness to do treatment, and his lack of ability to partake in significant treatment while previously serving a prison term. Moreover, the imposed sentences do not meet the primary goal of protection of society because in Mr. Hogan's case, that goal can only be met through intensive treatment.

In both cases, Mr. Hogan entered pleas, accepting responsibility. This early acceptance of responsibility is mitigating. *See State v. Shideler*, 103 Idaho 593, 594 (1982). Moreover, acknowledgment of guilt and acceptance of responsibility by the defendant are critical first steps toward rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010). During his plea colloquies at sentencing, he expressed remorse and his understanding how his actions affected others. In Case One, he stated, "I apologize to the community and to everybody I've affected because of my actions and my poor decisions." (Tr. 1, p.35, Ls.18-20.) In Case Two, although he entered an *Alford* plea and contested some of the facts, he ultimately recognized he played a part. "But I take responsibility for this because just like a drunk driver, if he wouldn't have drank before he drove, he wouldn't have got in a wreck. And then the same thing with this. If I wouldn't have been using drugs, I wouldn't have been in this situation, and I wouldn't have inadvertently victimized somebody in this community." He went on to explain that he would pay the victim back everything he lost. (Tr. 2, p.56, Ls.15-25.) Mr. Hogan should be afforded credit for resolving his cases prior to trial, and understanding the ramifications of his actions.

Mr. Hogan had a very traumatic childhood, and was in and out of foster homes at an early age. He did not have a relationship with his biological father until he was 30, and his mother died when he was 7. (PSI, p.12.) Through a church, he was adopted by the Hogan family. He hoped that would be a safe place, but the Hogans were abusive. (PSI, p.12.) Mr. Hogan was sexually and physically assaulted by his adoptive brother, and once was tied to the bed by his

parents for an entire Christmas break. (PSI, p.12.) The state intervened and removed him from the home, but he cycled through several more foster homes. (PSI, p.13.) Not surprisingly, he turned to others outside his family. Not surprisingly, he suffered, and continues to suffer, from depression and PTSD, and he has even attempted to kill himself on several occasions. (PSI, pp.24-25.)

When he was a teenager, and living in Georgia, he joined the Skinheads. (PSI, p.13.) He engaged in several crimes over the years, admittedly accumulating a significant criminal history. (PSI, pp.5-12.) In 2003, he was convicted of a robbery and sentenced to a thirty year term, ten years determinate. (PSI, p.10.) But Mr. Hogan has not lived that lifestyle for many years. And when a previously affiliated gang member with a violent criminal history makes major strides to change his behavior, mindset and lifestyle, particularly against the backdrop of childhood trauma, abuse and neglect, and restrictive housing, the court must take note.

Around 2009, Mr. Hogan began efforts to disavow criminal behavior and extricate himself from a gang through a “step-down” process. This positive decision nonetheless has caused him some personal peril, because as a result of his decision to leave the gang, he has been physically assaulted by former gang members inside the prison. (PSI, p.35.) It has also been a factor in the decision to house him in administrative segregation, where he served his time in isolation, with severe restrictions. (PSI, generally, pp.62-147.) Most of his incarceration on the robbery case was spent in this manner, and Mr. Hogan did not receive substantive substance abuse treatment or mental health treatment. Nonetheless, he engaged in impressive self-study. (PSI, generally, pp.62-147.)

Mr. Hogan’s prison records depict an intelligent man with great drive for self-improvement and changed behavior. At times, he even exceeded expectations when encouraged

and recognized for his positive behavior. (PSI, generally, pp.62-147.) For instance, in November 20, 2006, staff noted Mr. Hogan's demonstrated drive towards self-improvement, his ability to learn from his mistakes, his change in demeanor, and his respectful behavior. (PSI, p.64.) In January 2007, staff noted that despite being on restrictive housing in administration segregation for two years after a fight, Mr. Hogan "is reading self-help books and is able to articulate his past bad behavior and how he can go about making changes." (PSI, p.64.) On February 01, 2008, staff noted, "[o]ffender requested that I review his Cage Your Rage workbook. . . seemed to have a pretty good grasp of the material . . . overall it appeared as if he had put some thought into them," and was able to control his emotions during a difficult meeting. (PSI, p.67.)

On March 13, 2008, he asked to "debrief" with someone about his gang involvement and requested an incentive such as "being able to be placed someplace that he can go to school, take programs and possibly help others." (PSI, p.68.) On January 12, 2011, he submitted a book report on "Why Some Positive Thinkers Get Powerful Results" by Dr. Norman Vicent Peale, and created a list of short term and long term goals. (PSI, p.80.) In May of 2011, he completed a book on Anger and one called Homecoming; in June, he completed one on self-worth. (PSI, pp.80-81.) In the summer of 2011, he submitted a book report on "Choice Theory," and went through the book "Narcotics Anonymous." (PSI, p.88.) As he continued on the gang step-down process, he completed a report which earned him 88%, the highest score in the class, and he assisted another inmate to reach his goals. (PSI, p.92.) In January of 2012, he wrote a very good report on "The Seven Habits of Highly Effective People." (PSI, p.94.) In July of 2013, he sought more challenging services to help him and he was running a recovery class at the chapel. (PSI, pp.100-101.) The foregoing are examples of Mr. Hogan's amenability to treatment and

willingness to improve himself. He remains dedicated towards that end, yet self-study is only so effective. Mr. Hogan needs more treatment and assistance to fully and successfully transition into the community. (PSI, pp.35, 49.)

Outside of his actions to improve himself, the expert evaluators participating in presentence were also supportive of the need for treatment, and substance abuse is a mitigating factor in sentencing. *State v. Nice*, 103 Idaho 89, 645 P.2d 323 (1982). According to the GAIN substance abuse evaluator, Mr. Hogan indicated a high motivation for treatment, and he met the criteria for Level II.1 Intensive Outpatient Treatment. (PSI, pp.35-36.) Dr. Sombke, who conducted a mental health evaluation, also stressed the need for major treatment as well as the lack of risk in treating Mr. Hogan:

Benefits for treating Mr. Hogan's substance abuse problem includes helping him learn how to discontinue his drug use, which would allow him to maintain more pro-social behavior in the community. It would also help him maintain employment and maintain relationships. The benefits for treating Mr. Hogan's antisocial personality disorder with some kind of cognitive thinking type program includes teaching him more pro-social means of living in the world. These types of programs can help him learn how to discontinue his criminal behaviors and keep him from living the criminal lifestyle. They can also help to identify high risk situations and help him learn how to avoid them. The benefits for treating Mr. Hogan's PTSD and depression includes him being able to live a more comfortable life and alleviating the urge to self-medicate with illegal drugs, which then leads him to engage in criminal activities. *Benefits for non-treatment: This examiner does not know of any benefits for not treating Mr. Hogan's substance abuse problem. This examiner does not know of benefits for not treating Mr. Hogan's antisocial personality disorder, his PTSD, or his depression.*"

(PSI, p.49) (emphasis added.) Based upon expert analyses, Mr. Hogan remains in dire need of treatment. Meanwhile, he has been incarcerated almost exclusively in the custody of IDOC since 2003. Absent documentation that IDOC actually immersed Mr. Hogan in a substantive treatment program for his substance abuse, trauma and mental health issues, it is only logical to conclude that when he serves the currently imposed four and one-half year term, there will be no

significant change in level of care or treatment. Therefore, based upon Mr. Hogan's personal history and his need for substantive treatment, his sentences are wholly unreasonable because he will not likely receive the crucial treatment while serving a determinate term for many years. In contrast, had the district courts imposed a rider, or probation with court ordered treatment, IDOC would be required to ensure he receives the necessary programming. Moreover, given Mr. Hogan's eagerness for treatment, and identification of a substantive plan, he has a good chance of success. And Mr. Hogan, with treatment, does not present as high risk to the community.

Mr. Hogan's overall risk to the community is moderate, not high. Dr. Sombke's psychological report reflects that Mr. Hogan's "overall risk to the community appears to be at least moderate, but if he starts using drugs again and if he does not receive any kind of supportive treatment he would certainly become a high risk to the public. If Mr. Hogan can remain drug free, maintain some kind of employment, and stabilize his life, he has the capacity to become a prosocial individual and a productive member of society." (PSI, p.50.) This expert opinion reveals both that Mr. Hogan is not currently a high risk to the community and that he will become lower risk only if he receives treatment. Moreover, Mr. Hogan's risk rating does not necessarily denote high risk.

One of the factors commonly relied upon by a sentencing court is an LSI rating, yet here, the record contains two very disparate LSI's that cannot be reconciled. The LSI by the PSI investigator in the June 12, 2017, PSI was 46, whereas just weeks before, May 25, 2017, IDOC noted an LSI of 26. (PSI, pp.1, 145.) In addition, Mr. Hogan is not an active gang member. During the first arrest, he was found at the house of Devin Elmore. No other facts are in the record regarding gangs, despite that the prosecution in both cases argued about Mr. Hogan's

current gang activity.⁶ During Mr. Hogan's February 1, 2016, face to face contact with his parole officer, they discussed Mr. Hogan's beliefs and activities, and the parole officer was satisfied there were no gang related concerns. (PSI, p.128) ("From the meeting, I did not leave the meeting w/ concerns for public safety as [Hogan] assured me that he [is] not of the criminal ways of the Skinheads and wants to live a better life w/o crime.") The record also documents Mr. Hogan's plans to use his prior gang involvement for good. (PSI, p.126) ("[Mr. Hogan] said that he is no longer in the gang and he wants to use his gang-related ink for educational purposes.") See also PSI, p.129, where no security concerns were noted. Lastly, Mr. Hogan has not committed any recent violent crime. The crimes for which he was recently sentenced are related to drugs or theft, but not violence. His transgressions have become less severe and less

⁶ In Case One, the prosecution contended that Mr. Hogan was found at the home of Devin Elmore, who the prosecutor described as:

a violent gang member [and] defendant claims that he's no longer a gang member. His tattoos say otherwise. The defendant had time while he was out to get those tattoos covered or remove them and he chose not to. Additionally, on this case the defendant was found with Devin Elmore, and that is significant because Mr. Elmore is an SVC member, and SVC and the Aryan Knights, like the defendant, are connected, they run tiers in the prison together, they do debt enforcement and collection together and they also attack people together. So it is not a surprise that an Aryan Knight like the defendant would be found with an SCV gang member.

(Tr. 1, p.7, Ls.15-18). In Case Two, the prosecution stated, "the defendant says he is no longer a gang member. It is worth noting that he has tattoos consistent with gang membership. When he was arrested on the case in front of [the district court], he is found with Devon Elmore, who has the letters 'SVC' tattooed across his stomach, hanging out with gang members. SVC and Aryan Knights interact together in prison. They were on tiers in the prison together, so I find that statement disingenuous." (Tr. 2, p.45, Ls.17-25; p.46, L.1). Defendant did not object to these comments during either sentencing, however, Mr. Hogan requests this Court, during its independent review, to disregard the prosecution's statements because they are irrelevant and unreliable. See *State v. Sivak*, 127 Idaho 387, 390-91, 901 P.2d 494, 497-98 (1995) (the reviewing court "presume[s] that a sentencing judge is able to ascertain the relevancy and reliability of a broad range of information which may be presented during the sentencing process, and to disregard that which is irrelevant and unreliable.").

serious, demonstrating growth and improvement. He has become more peaceful, respectful and non-aggressive.

Here, under a reasonable view of the mitigating facts in each case, Mr. Hogan's sentence is excessive because it causes him to be placed inside a prison for a cumulative four and one-half years followed by twenty or more years of parole supervision, where he is not likely to receive the individualized, dedicated and intensive treatment that he needs. (PSI, pp.10-11.) This is contrary to the goals of sentencing. The primary sentencing consideration is the good order and protection of society. *State v. Petit*, 104 Idaho 601, 661 P.2d 767 (Ct. App. 1983). In Mr. Hogan's case, this primary goal can only be served by preparing Mr. Hogan for exit from administrative segregation and institutions. Sentencing goals here are best achieved by imposing a rider or reducing Mr. Hogan's sentence given Mr. Hogan's, as well as the community's, dire need for his rehabilitation, including treatment which takes place sooner than later. Absent this prompt treatment, Mr. Hogan will be similarly situated upon his future release as he was in December of 2015, meaning, without adequate skills and tools. The PSI materials go through Mr. Hogan's lengthy period of incarceration for his robbery and prior convictions. Mr. Hogan posits that they do not indicate he underwent a comprehensive substance abuse treatment program, or one related to his PTSD and other mental health challenges. With his current sentence, he will wait several more years for intensive treatment, or may not even receive it unless his parole officer mandates an inpatient program. In other words, his ability to receive intensive treatment is in doubt. This does not serve the citizens of Idaho. This is not a meaningful way to meet the goal of protection of society, which under these facts, is integrally linked to rehabilitation.

Each district court had a duty to consider his sentence as a whole and the nexus here between protection of society and rehabilitation, yet failed to reasonably respond. Each district court recognized Mr. Hogan's severe robbery punishment and his dire need for substance abuse and mental health services. In Case One, the court acknowledged Mr. Hogan's "horrific" childhood. "This case is in some regards painfully emblematic of what happens when we treat our children as less than human." (Tr. 1, p.38, Ls.16-18.) The court acknowledged Mr. Hogan did not receive sufficient tools in custody.

[T]his case in some respects also highlights the problems that existed in the state's effort with respect to advancing . . . justice reinvestment And so rather than giving them enough time to be treated appropriately and ensure they are safe, they were put back out in the community too quickly and they commit new crimes and victimize the community further. And now here Mr. Hogan sits having done that.

(Tr. 1, p.39, Ls.10-20.) Yet, instead of fully responding to Mr. Hogan's need for substance abuse, instead of responding to Mr. Hogan's need for mental health treatment, instead of correcting a disconnect in the justice system by releasing ill-equipped parolees back into the community, and instead of responding to the nexus between protection of society and the condition in which inmates are released, the court imposed a determinate three years. There is no assurance that Mr. Hogan will get any more treatment during this four and one-half year term of custody than he did between 2003 and 2015. As such, his three year determinate sentence was unreasonable and excessive. Likewise, the district court in Case Two failed to properly balance the equities.

In Case Two, the district court remarked, "[s]o I suppose the bright side way to look at that from the defendant's perspective is that Dr. Sombke's assessment is that while he presents plenty of risk, if he doesn't receive appropriate treatment, he is the lost cause and has the capacity to do well if the justice system gives him some help along those lines." (Tr. 2, p.63,

ls.3-6.) The district court was fully aware that Mr. Hogan had a lengthy indeterminate term hanging over his head, and was aware that Mr. Hogan received a three year fixed sentence, yet imposed more fixed time. The district court failed to prioritize the protection of society and that goal's dependence upon Mr. Hogan's rehabilitation. Just as the sentence in Case One is excessive, the sentence in Case Two is excessive.

II.

The District Courts Abused Their Discretion in Denying Mr. Hogan's Motions To Reduce His Sentences By Failing To Consider His Sentences As A Whole And Properly Balance The Mitigating Factors

A motion to reduce an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court and is essentially a plea for leniency. *State v. Knighton*, 143 Idaho 318, 318, 144 P.3d 23, 24 (2006). The burden is on the appellant to show how the sentence is excessive based upon new or additional information submitted since the original hearing. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). The standards for reviewing a denial of a motion to reduce a sentence under Rule 35 are the same as the standards for determining whether the original standard was excessive. *State v. Snapp*, 113 Idaho 350, 351 (Ct. App. 1987). Upon review of a Rule 35 denial, the court "not only examine[s] the record extant at the time of the original sentencing, [it] also examine[s] any additional information subsequently presented to the district court in support of the motion." *State v. Shiloff*, 125 Idaho 104, 107, 867 P.2d 978, 981 (1994). Here, Mr. Hogan's sentences in both cases were shown to be excessive based upon the attached documentation as well as the changed fact of his consecutive sentence.

Mr. Hogan submitted a similar Rule 35 motion with identical attachments in each case, requesting that the court modify his sentence by retaining jurisdiction and ordering him to

participate in the New Life Discipleship Recovery Program. He included his own letter, which was heartfelt and sincere and contained new information regarding his gang debrief. Specifically, he relayed that he provided intelligence on the former gang and now has a “hit” on him. (R. 2, pp.95-104.) (PSI, p.99.) He also articulated a detailed treatment plan, presented extensive information from the treatment facility such that the district court could assess the program’s merits, documentation of his administrative segregation status, and a letter of commendation from IDOC, all of which was new. (R. pp.101-104, 117-134.) Even more significant, his posture had changed from the original sentencing in that the district court in Case Two ordered his sentences to be served consecutive to the one imposed by the court in Case One. Thus, even assuming the initial sentence in Case One was not excessive, it became so due to the effect of the consecutive sentence.

As to the changed posture of Case One, Mr. Hogan’s parole eligibility (and treatment) was extended from three years to four and one-half years. Several years in prison, without assurances of intensive treatment, rendered the sentence unreasonable under any view of the facts because the sentence was unnecessary to achieve sentencing goals.

The district court in Case Two similarly abused its discretion because it failed to properly consider the importance of Mr. Hogan’s rehabilitation. Both the Idaho Supreme Court and the Idaho Court of Appeals have recognized that the timing of rehabilitative programming is an important consideration at sentencing. *See, e.g., State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971); *State v. Nice*, 103 Idaho 89, 91 (1982); *Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008); *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988). As such, Mr. Hogan’s Rule 35 motions should have been granted.

CONCLUSION

Mr. Hogan respectfully requests that this Court reduce his sentences as it deems appropriate, such that Mr. Hogan can receive a reasonable sentence that ensures he receives substantive treatment in a prompt fashion. Alternatively, Mr. Hogan requests that the orders denying his Rule 35 motions be vacated and the cases be remanded for sentencing.

DATED this 20th day of December, 2017.

_____/s/_____
LARA E. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of December, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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STEVEN J HIPPLER
DISTRICT COURT JUDGE
E-MAILED BRIEF

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_____/s/_____
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Administrative Assistant