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**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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**COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)**

CRIMINAL CASE NO. 13-0040

8

Plaintiff,)

9

v.)

**ORDER GRANTING
DEFENDANT'S MOTION TO
REDUCE SENTENCE**

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**ARLENE D. HART,)
d.o.b. 09/09/1961)**

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Defendant.)

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I. INTRODUCTION

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THIS MATTER came before the Court on Thursday, August 8, 2014 at 1:30 p.m. on Defendant's Motion to Reduce Sentence in Courtroom 205A. The Commonwealth of the Northern Mariana Islands ("Government") was represented by Chief Prosecutor, Brian Flaherty. Defendant Arlene D. Hart ("Defendant") was represented by Assistant Public Defender Matthew Meyer.

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II. BACKGROUND

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On March 25, 2014, Defendant pled guilty to the offense of theft by unlawful taking or disposition, in violation of 6 CMC § 1608. The plea agreement submitted gave the Court discretion to sentence Defendant to a term of imprisonment of between zero and eighteen months. The Court sentenced her to a term of eleven months in prison.

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On May 9, 2014, Defendant filed a Motion to Reduce Sentence pursuant to NMI R. Crim. P. 35(b). In support of her motion, Defendant states that she (1) has made full restitution, (2) is nearly

1 53 years old and until recently had never been convicted of any criminal offense, (3) is now a
2 convicted felon, (4) additional time in prison will not have any meaningful impact on her because,
3 absent the extraordinary circumstances surrounding this crime, she is not “a bad or immoral person”
4 and the term of imprisonment has already worked to ensure that she will never again commit such
5 an act, (5) she has two sons and a husband, and (6) the newly assigned prosecutor refused to honor
6 the deal struck by the former prosecutor handling this case. Mot. at pp 3-4. Defendant has also
7 submitted letters from two of her sisters, who attest to Defendant’s good character.

8 In opposition, the Government argues that the Court accepted the plea agreement and found
9 Defendant guilty. The Court previously considered the facts of the case, recommendations of
10 counsel, the mitigating factors, and the plea agreement when determining its sentence. All of the
11 information currently presented to the Court could have and should have been brought up prior to
12 sentencing. Restitution was a condition contained in the plea agreement, and the Court should not
13 reward the Defendant for merely fulfilling an agreed upon obligation. Further, a sentence may be
14 reduced in the case of a plea agreement only where exceptional circumstances exist. Family
15 hardship, a defendant’s good character, and a defendant’s rehabilitation are insufficient reasons to
16 reduce any such sentence. Finally, the Government argued orally that the Court should deny this
17 motion in order to prevent other convicted criminals from flooding the Commonwealth trial courts
18 with similar motions.

19 **III. LEGAL STANDARD**

20 “A motion to reduce a sentence may be made, or the court may reduce a sentence without
21 motion, within 120 days after the sentence is imposed or probation is revoked”. NMI R. Crim. P.
22 35(b). Our Rule 35(b) was modeled after the Federal Rule of the same number, as modified by the
23 1983 amendment. As such, it is appropriate to look to federal interpretation of the rule.
24 *Commonwealth v. Laniyo*, 2012 MP 1 ¶¶ 6, 15; citing *Commonwealth v. Attao*, 2005 MP 8 ¶ 9 n.7

1 and *Dev. Auth. v. Camacho*, 2010 MP 19 ¶ 16 respectively. The Federal Rules Advisory Committee
2 stated that “the underlying objective of [R]ule 35...is to ‘give every convicted defendant a second
3 round before the sentencing judge and afford the judge an opportunity to reconsider the sentence in
4 light of any further information about the defendant or the case which may have been presented to
5 him in the interim.” Fed. R. Crim. P. 35(b) (1983) (Notes of Advisory Committee on Rules, 1983
6 Amendment, citing *United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir. 1968).

7 Rule 35(b) does not require the sentencing judge to justify his decision related to a request
8 to reduce sentence, nor does it set out any guidelines for a judge to consider when making this
9 decision. However, many decisions have issued providing reasons for and against reduction. In
10 *Irizzary v. United States*, the court reduced the defendant’s sentence based upon a hardship faced by
11 his wife and children in his absence that was verified by a probation officer, who recommended
12 reduction after observing the deterioration of the family. *Irizzary v. United States*, 58 F.R.D. 65
13 (D.Mass. 1973). In *United States v. Doe*, the court reduced a prison sentence based solely on the
14 fact that the defendant would lose his CPA license, finding that this loss was a “severe blow
15 regardless of what might be the true cause of the defendant’s regret”. *United States v. Doe*, 53
16 F.R.D. 361, 363 (D.N.Y. 1971). On the other hand, reduction was denied in *United States v. Baylin*,
17 where the court had extensively reviewed the record, considered both aggravating and mitigating
18 circumstances, as well as the nature of the charged offense and statements of the defendant and his
19 attorney, and the sentencing decision was carefully thought out when the sentence was originally
20 imposed. *United States v. Baylin*, 531 F. Supp. 741 (D.Del. 1982). These cases demonstrate the
21 wide latitude given to judges in deciding Rule 35(b) motions.

22 Appellate courts reviewing the propriety of a trial court’s Rule 35(b) decision have looked
23 to three key issues: (1) whether the sentence imposed was within the statutory maximum, (2)
24 whether the sentence was individualized, and (3) and whether the government honored any

1 promises made when agreeing to a plea deal. 26-635 Moore's Federal Practice – Criminal
2 Procedure § 635 App. 102.

3 **IV. DISCUSSION**

4 **A. The sentence was within the statutory maximum**

5 Here, the statutory maximum sentence is a prison term of five years. 6 CMC §§ 1601(b)(3),
6 4101(c). In accordance with the plea agreement, the Court had discretion to sentence Defendant to a
7 term of zero to eighteen months. The Court sentenced Defendant to a term of eleven months in
8 prison, well below the maximum statutory term and within the term as set out in the plea agreement.

9 **B. The Court's sentence was individualized**

10 The Court carefully reviewed all mitigating and aggravating factors presented during the
11 sentencing hearing and even questioned the Defendant to get a sense of her individual
12 circumstances. The Court considered the circumstances surrounding the crime, particularly in
13 relation to Defendant's mother's medical condition. The Defendant testified that she sought
14 assistance from her employer before stealing the money. She did not, however, seek any assistance
15 from her family in order to pay for her mother's medical expenses.

16 The Court also considered Defendant's family ties and her sense of obligation for her
17 mother's care. The Court carefully reviewed all of the circumstances surrounding this case,
18 including the fact that Defendant has no prior convictions, and sentenced her in a fashion it believed
19 was commensurate with the gravity of the crime.

20 **C. The Government honored its plea agreement**

21 Defendant states that the Court should consider that the original prosecutor in this case,
22 Assistant Attorney General Cinta Kaipat, agreed to recommend a sentence of only two months
23 imprisonment. That deal, however, was not honored by the subsequently assigned prosecuting
24 attorney. The Government informed the Court that it was unaware of any such agreement. The

1 Government has, however, stated that it extended an offer of no prison time to the Defendant if she
2 made full restitution up front. Defendant refused this offer. The circumstances surrounding this
3 refusal are unclear, but it may have something to do with the victim's insistence that Defendant
4 spend time in prison. The parties eventually agreed upon a plea deal that gave the Court discretion
5 to render a sentence. To that extent, the Government honored its commitment.

6 Our Supreme Court has previously determined that plea agreements are unilateral contracts,
7 in which the defendant can accept only through performance. *Camacho*, 2002 MP at ¶ 13. Thus, the
8 mere extension of an offer or defendant's mere acceptance of an offer does not create a
9 constitutional right to have that bargain enforced. *United States v. Papaleo*, 853 F.2d 16, 19 (1998).
10 Rather, a plea agreement is nonbinding, and either party may withdraw at any time before a
11 criminal defendant performs by pleading guilty and the plea agreement is approved by the Court.
12 *Camacho*, 2002 MP ¶ 14. See also *Papaleo*, 835 F.2d at 20; *United States v. Savage*, 978 F.2d
13 1136, 1138 (9th Cir. 1992).

14 The Court agrees with Defendant that prosecutors should honor the deals struck by their
15 predecessors, but the law of the Commonwealth does not require such action. Plea negotiations are
16 ongoing works that will necessarily have both high and low offers. Here, the prosecutor in question
17 does not even remember the offer mentioned by defense counsel. Again though, no deal is final
18 until it is brought before the Court, and evidence of deals on the table during negotiations in no way
19 implicates the Government in failing to honor its promises to a criminal defendant. Hence, this
20 particular argument is without merit.

21 **D. Other considerations**

22 **1. Exceptional circumstances**

23 The Government has stated that exceptional circumstances must exist for this Court to
24 reduce its original sentence because the case was resolved through a plea bargain. However, the

1 cases cited by the Government all deal with plea bargains where the sentences were already
2 determined in the agreement. There was no such fixed term of imprisonment set in the plea
3 agreement in this case. Rather, any term of imprisonment was to be determined at the Court's
4 discretion, with the limitation that eighteen months would be the maximum allowed term, as
5 opposed to the five years provided by statute.

6 Accordingly, the Court retains that discretion over Defendant's sentence. However, the
7 Court reminds the parties that the exceptional circumstances standard does apply in plea deals
8 where the sentence is fixed by mutual agreement. Any similar motion brought in relation to that
9 type of plea agreement will not receive the same consideration as the instant case.

10 **2. Deterrence**

11 Defendant has argued that the shame of a criminal conviction and the time she has already
12 spent in prison have had a deterrent effect on her and that she is unlikely to commit any crimes in
13 the future. The Court agrees that this particular Defendant is unlikely to become a re-offender.

14 The Government contends that Defendant should remain in prison until her original
15 sentence ends as a deterrent to the community. At the time of sentencing, Defendant's former
16 employer was also in favor of giving her an extended prison term to prevent his other employees
17 from following her example.

18 The Court must, then, balance the deterrent effect of the sentence between those related to
19 this Defendant and those of the community. Defendant admitted her guilt in the theft of \$6,831.66
20 from her employer, Ecosure Insurance. The situation surrounding this incident was unique to her in
21 that her mother was ill and needed money for medical treatment. Defendant was ultimately caught.
22 Thereafter, she admitted guilt, repaid the stolen money, and has spent several months in prison. The
23 severity of the punishment she has received thus far is likely to prevent her from re-offending and is
24 also likely to have a deterrent effect on the community.

1 The Court cannot stress enough the harshness of a prison term. Prisoners are kept separate
2 from their family, friends, and community. While in prison, they are unable to work and socialize,
3 and they live regimented lives over which they have very limited control. Their sentences are
4 announced in the newspapers, and upon release, they have the stigma of being a convicted criminal
5 who has spent time in prison. It is often quite difficult for them to re-assimilate into their normal
6 lives and find work. The Court does not believe that a reduction in Defendant's prison term would
7 undermine the deterrent effect of the threat of prison.

8 **3. Precedent**

9 The Government asks the Court to consider the issue of precedent, arguing that other
10 convicted criminals may be encouraged to file similar motions for reductions in sentence if the
11 Court grants this motion. While this may be a resulting factor, it cannot be the only one the Court
12 considers. Sentences must be individualized, and the stronger consideration should be related to the
13 individual currently serving a prison sentence.

14 Further, a single order reducing a criminal sentence is unlikely to create the response that
15 the Government articulates. These motions are quite rare and for good reason. It is unusual for any
16 judge to reconsider factors already detailed at a sentencing hearing, and it is equally unusual for a
17 judge to consider factors for the first time, whether existing at the time of sentence or newly
18 materialized, after a sentence has been imposed. All mitigating factors are generally presented
19 before the sentence is issued, and it will be the very rare case where these types of facts would be
20 presented post-sentence. Any criminal defendant waiting until after he has been sentenced to
21 present all available mitigating factors is taking a great risk that his sentence will be harsh and that
22 the judge will be unwilling to reconsider the sentencing decision. Accordingly, it is unlikely that
23 any reduction in this case will do much to change the general lack of Rule 35(b) motions.

1 This case itself is unique in that this Defendant was so ashamed by her actions that she did
2 not even tell her family about the ongoing criminal case against her. Instead, her sisters became
3 aware of her legal problems only after they read about her conviction and sentence in the
4 newspaper.

5 **4. Government recommendation**

6 Finally, the Court, after obtaining permission from Attorneys Flaherty and Meyer, spoke to
7 Assistant Attorney General Kaipat. AAG Kaipat informed the Court that she was originally in favor
8 of a sentence that contained no time in prison provided there was immediate restitution. It was her
9 understanding, however, that the victim insisted that Defendant serve a prison term. Attorney
10 Kaipat also informed the Court that Investigator Vince Babauta had also recommended that
11 Defendant not be sentenced to prison because she had been very forthcoming and helpful in their
12 investigation. She showed true remorse and a willingness to repay the money from the outset of the
13 investigation.

14 **V. CONCLUSION**

15 After considering all the factors detailed above, the Court **GRANTS** Defendant's motion to
16 reduce sentence.

17 Defendant shall be released from the Department of Corrections on **Sunday, August 31,**
18 **2014 at 5:00 p.m.**

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20 **SO ORDERED** this 13th day of August 2014.

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22 
23 KENNETH L. GOVENDO
24 ASSOCIATE JUDGE