

STATE OF IDAHO)
 County of KOOTENAI)
 FILED 2/23/2022)^{ss}
 At 10:15) O'clock A M
 CLERK, DISTRICT COURT
[Signature]
 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.)
)
 GREGORY WADE TOWNER, SR.)
)
 DOB: 08/31/1965)
)
 SSN: xxx-xx-0469)
)
 IDOC: 23310)
)
 Defendant.)

Case No. **CR28-20-18022**

**MEMORANDUM DECISION
 AND ORDER DENYING
 DEFENDANT'S MOTION FOR
 MODIFICATION OF
 SENTENCE PURSUANT TO
 I.C.R. 35(b)**

On November 23, 2021, before the Honorable John T. Mitchell, District Judge, you, GREGORY WADE TOWNER, SR. (Towner), appeared for an admit/deny hearing on a probation violation in two cases: CR28-20-18022 and CR28-18-12846. Also appearing was Casey Drews, a representative of the Prosecuting Attorney for KOOTENAI County, Idaho and your lawyer, Jonathan Williams. At that hearing you admitted violating the terms of your probation in both cases. The Court then set disposition out to February 1, 2022, to allow Towner time to find suitable housing. On February 1, 2022, Towner appeared for disposition in both cases. At that hearing, the Court revoked probation in both cases and imposed the following sentences:

**CR28-18-12846 -
 POSSESSION OF A
 CONTROLLED
 SUBSTANCE
 (METHAMPHETAMINE)**

To the custody of the State of Idaho Board of Correction for a fixed sentence of SEVEN (7) years followed by an indeterminate term of ZERO (0) years for a total unified sentence of SEVEN (7) years. IS MODIFIED AS FOLLOWS: To the custody of the State of Idaho Board of Correction for a fixed sentence of FIVE (5) years followed by an indeterminate term of TWO (2) years for a total unified sentence of SEVEN (7) years.

**CR28-20-18022 -
 POSSESSION OF A
 CONTROLLED**

Your probation is revoked and your suspended sentence in CR28-20-18022 is imposed and NOT modified as follows:
 To the custody of the State of Idaho Board of Correction for a fixed sentence of ZERO (0) years followed by an indeterminate term of SEVEN (7) years

**SUBSTANCE
(METHAMPHETAMINE)**

for a total unified sentence of SEVEN (7) years.
THIS SENTENCE RUNS CONSECUTIVE TO THE
SENTENCE PREVIOUSLY IMPOSED IN CR28-18-
12846.

February 1, 2022, Probation Violation Disposition, 1-2. The Court committed Towner to the custody of the State of Idaho Department of Correction in both cases. *Id.* at 2.

On February 14, 2022, Towner, through his attorney Jonathan Williams, timely filed the instant Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support in case number CR28-20-18022. Towner bases this motion on a “plea for leniency.” Mot. for Modification of Sentence Pursuant to I.C.R. 35(b) 1. The requested relief is for a reduction in the indeterminate portion of his sentence from seven years to three years. *Id.* at 2. Counsel for Towner states, “Additional evidence will likely include testimony from the defendant and possible other individuals, and potentially documentation in support of the defendant’s request.” *Id.* at 3. Towner requested a hearing on his I.C.R. 35 Motion. *Id.*

In between the time when this Court imposed Towner’s sentences on February 1, 2022, and when Towner filed his I.C.R. 35 Motion in the present case, the Idaho Supreme Court on February 3, 2022, issued and filed its opinion in Towner’s case number CR28-18-12846, reversing this Court’s November 9, 2018, Order Denying Defendant’s Motion to Suppress in that case, and vacating Towner’s conviction in that case. Idaho Supreme Court Docket No. 48899. That February 3, 2022, opinion by the Idaho Supreme Court overruled the Idaho Court of Appeals unpublished opinion filed on March 10, 2021, which affirmed this Court’s decision denying Towner’s motion to suppress in that case. Idaho Court of Appeals Docket No. 47396. While the Remittitur has not been filed by the Idaho Supreme Court regarding its February 3, 2022, opinion in CR28-18-12846 (as of the date of this Court’s instant decision on Towner’s I.C.R. 35 Motion in CR28-20-18022), once that Remittitur is filed and the sentence in CR28-18-12846 is vacated, Towner will instantly be parole eligible in CR28-20-18022, given that there is no fixed sentence in that case. Thus, if this Court were to grant Towner’s I.C.R. 35 Motion in CR28-20-18022, this Court would, a) reduce the amount of time the State of Idaho Parole Commission could keep Towner incarcerated were that Commission to deny Towner parole, and, b) if that Commission were to grant Towner parole, by granting Towner’s I.C.R. 35 Motion, this Court would reduce the amount of time that Towner could be placed on parole.

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. Copenhagen*, 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 Towner’s I.C.R. 35 motion. The Court has also re-reviewed the minutes of the admit/deny hearings held November 18, 2021, and November 23, 2021. This Court has reviewed the minutes of the disposition hearing held on February 1, 2022. This Court has re-reviewed the court files in both cases. There is nothing that could be presented at a hearing on this I.C.R. 35 motion that would be of benefit to the Court. A hearing would only waste counsel’s time and the Court’s time.

While Towner states, “additional evidence will likely include testimony from the defendant and possible other individuals, and potentially documentation in support of the defendant’s request” (Mot. for Modification of Sentence Pursuant to I.C.R. 35(b) 3), counsel for Towner has failed to state what that testimony might be. This gives this Court no idea of what Towner’s evidence would be at any hearing on his I.C.R. 35 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.2d 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 or she 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 or her 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, Towner has not set forth any evidence that could be adduced at hearing on an I.C.R. 35 motion. The Court cannot be required to guess at what evidence Towner might present in support of his Rule 35 Motion. Because Towner has completely failed to give any indication of any facts which would support his claim, his Rule 35 Motion must be denied due to that failure alone.

Recently, in a different case, the Idaho Court of Appeals affirmed this Court's denial of a defendant's I.C.R. 35 Motion without a hearing, and reiterated the necessity for a defendant to provide new or additional information in his or her I.C.R. 35 Motion:

A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). Rule 35(b) authorizes the court to consider a motion without the admission of additional testimony and without oral argument. However, the court may abuse its discretion if it unreasonably refuses to consider relevant evidence or otherwise unduly limits the information considered. *State v. Bayles*, 131 Idaho 624, 626-27, 962 P.2d 395, 397-98 (Ct. App. 1998). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987).

Regarding LaCaze's request for additional time and a hearing, this Court stated in *State v. Fortin*, 124 Idaho 323, 328, 859 P.2d 359, 364 (Ct. App. 1993):

A Rule 35 movant wishing to submit additional evidence

should make an “offer of proof” in the motion itself or by an accompanying affidavit to enable the district judge to make a reasoned decision on whether to hold an evidentiary hearing and to create a record upon which appellate review may be based.

In *Bayles*, 131 Idaho at 627, 962 P.2d at 398, we held:

If anticipated evidence is not yet available or if the defendant believes that an evidentiary hearing is essential because relevant evidence cannot be adequately presented in writing, such circumstances should be explained to the court in the motion or an accompanying affidavit.

LaCaze’s I.C.R. 35(b) motion presented no argument why sentence relief would be appropriate nor did it include any supporting evidence. Rather, LaCaze’s motion merely stated that he intended to file unidentified documentation from the Idaho Department of Correction, provide “testimony from other individuals,” and submit a written statement himself if given time to do so. He also indicated that he and others would testify at a hearing. LaCaze did not make an offer of proof in the motion itself or by an accompanying affidavit. Regarding the categories of information he noted, LaCaze acknowledges on appeal that it was not “an extremely robust explanation of the information he intended to provide.” However, as we have noted, the purpose of the offer of proof or affidavit is to explain the circumstances to the court so that it can make a reasoned decision on the request. LaCaze did not do so. As noted by the district court, LaCaze gave no indication what the information he planned to provide would show, or why the information was not available at the time the motion was filed. LaCaze did not present any basis or justification for his request and, therefore, the district court did not abuse its discretion in denying LaCaze’s I.C.R. 35(b) motion.

State v. LaCaze, Idaho Court of Appeals Docket No. 48859, 1-2 (Opinion filed February 14, 2022), Kootenai County Case No. CR28-20-5262. Counsel for Towner has filed to make any such offer of proof within the motion itself, and has not filed an accompanying affidavit.

Finally, there are additional reasons to deny Towner’s Rule 35 Motion without a hearing. First, is the relief he seeks, a reduction in the indeterminate portion of his sentence. This Court above notes the effect of such relief would be to constrict the amount of time Towner could possibly remain in custody on his indeterminate sentence were he to fail to make parole, and it would limit the amount of time the State of Idaho Parole Commission could keep Towner on parole if parole is granted. There is no

evidence provided that Towner poses any less risk to the public now as compared to February 1, 2022, when Towner had his disposition hearing at which his sentence was imposed. There is likewise no evidence provided that Towner should be given an indeterminate sentence less than seven years for purposes of rehabilitation, deterrence or punishment. Thus, there is no evidence that has been presented that could allow this Court to reconsider its earlier decision to impose the sentence it did and its decision to not utilize an additional period of retained jurisdiction and not to keep Towner on supervised probation. There is all the evidence to the contrary.

The sentence imposed on December 22, 2020 was an appropriate sentences given Towner's social and criminal history and the crime for which sentence was imposed. Any lesser sentence would depreciate the seriousness of Towner's crimes and constrict the State of Idaho Parole Commission. This Court concludes that the sentence imposed was necessary for the protection of society and the deterrence of Towner and others, and that remains the case today.

For the above mentioned reasons, Towner's I.C.R. 35 Motion in CR28-20-10822 must be denied without a hearing.

IT IS THEREFORE ORDERED that Towner's I.C.R. 35 Motion in CR28-20-10822 is hereby **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, GREGORY WADE TOWNER, SR., 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.

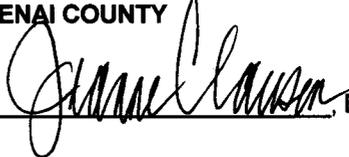
YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an appeal, you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer.

DATED this 22nd day of February, 2022.


John T. Mitchell, District Judge

I hereby certify that on the 22nd day of February, 2022 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:
Defense Attorney – Jonathan Williams *pat@xchegov.w*
Kootenai Co. Pros. Attorney *kepa@courtschegov.w*
GREGORY WADE TOWNER, SR.
IDOC NO. 137310

CERTIFICATE OF MAILING
CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:  Deputy