

STATE OF IDAHO)
 County of KOOTENAI)
 FILED 4/11/2022)
 At 1:43 P. 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,)	Case No. CR28-20-16288
Plaintiff,)	
vs.)	
ANDREW JAMES CURRY)	MEMORANDUM DECISION AND ORDER DENYING MOTION FOR MODIFICATION OF SENTENCE PURSUANT TO I.C.R. 35(b)
DOB: 02/06/1973)	
SSN: xxx-xx-7584)	
IDOC: 139232)	
Defendant.)	

On March 17, 2022, before the Honorable John T. Mitchell, District Judge, you, ANDREW JAMES CURRY (Curry), appeared for disposition on a probation violation (admissions were made previously on February 17, 2022). Also appearing was Tristan Poorman, a representative of the Prosecuting Attorney for KOOTENAI County, Idaho and your lawyer, Paul Szott. At the conclusion of that disposition hearing, the Court found that Curry had willfully violated his probation as alleged in the Affidavit in support of Agent's Warrant filed February 9, 2022 and the Report of Violation dated February 13, 2022 (filed February 17, 2022), the Court imposed the following sentence:

DOMESTIC BATTERY, – to the custody of the Idaho State Board of Correction for a fixed term of TWO (2) years followed by an indeterminate term of FOUR (4) years, for a total term not to exceed SIX (6) years.

March 15, 2022, Probation Violation Disposition, 1-2. The Court imposed that sentence but retained jurisdiction *Id.* at 2.

On April 8, 2022, Curry, through his attorney, timely filed a Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support Thereof. Curry bases this motion on a “plea for leniency.” Mot. for Modification of Sentence Pursuant to I.C.R. 35(b) 1. The only detail provided is as follows: “The pleading supports a request to modify Andrew James Curry’s disposition for probation.” *Id.* at 2. Counsel for Curry then 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. Defendant requested a hearing on his I.C.R. 35 Motion. *Id.*

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. Copenhaver*, 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 Curry’s I.C.R. 35 motion. The Court has also re-reviewed the minutes of the March 17, 2022 disposition hearing, and the February 17, 2022, admit/deny hearing. The Court has re-reviewed Curry’s entire file including the pre-sentence report filed March 9, 2021. This Court is very aware of Curry through his participation in the Kootenai County Mental Health Court. 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 counsel for Curry 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 Curry fails to state what that testimony might be. That language, “additional evidence will likely include testimony from the defendant and possible other individuals, and potentially documentation in support of the defendant’s request”, is found on nearly all I.C.R. 35 Motions emanating from the Kootenai County Public Defender’s office, and the usual result from this Court is to deny all such I.C.R. 35 Motions without a hearing, all for the same reason. This language in Curry’s I.C.R. 35 Motion (as in other similar motions filed in other cases) gives this Court absolutely no idea of what Curry’s evidence would be at any hearing on his I.C.R. 35 motion. That failure can be fatal to such motion, as is shown in the next paragraph. In Curry’s case, that failure is fatal to 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, Curry 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 Curry might present in support of his Rule 35 Motion. Because Curry 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.

Finally, Curry’s statement, “The pleading supports a request to modify Andrew James Curry’s disposition for probation,” is circular nonsense. Mot. for Modification of Sentence Pursuant to I.C.R. 35(b) 2. The “pleading” referred to is the Motion for Modification of Sentence Pursuant to I.C.R. 35(b) itself. The Court has already explained that the motion itself has no evidence nor any explanation of any evidence that might be presented. Thus, to claim, “The pleading supports a request to modify” is simply false.

There are additional reasons to deny Curry’s Rule 35 Motion without a hearing. The first is the relief Curry seeks--probation rather than being placed on a period of retained jurisdiction. There has been no evidence provided that Curry is any less appropriate to be placed on a period of retained jurisdiction at the present time, as

compared to his March 17, 2022, disposition hearing. There is likewise no evidence provided that Curry should be placed on probation currently, compared to his March 17, 2022, disposition hearing. Thus, there is no evidence that has been presented that could allow this Court to reconsider its earlier decision to impose the sentence and retain jurisdiction. All the evidence to the contrary. Curry has a history of violence. Curry has a history of at times refusing to take his mental health medication. Curry has a history of at times being defiant with to his probation officer's requests. Second, from a factual standpoint, nothing has been presented by Curry that would change any of the facts presented to the Court at his March 17, 2022, disposition hearing. Finally, at Curry's March 17, 2022, disposition hearing, his probation officer, Haley Rose, testified that she felt that probation without Curry living in the Hart House program would not be appropriate. Thus, according to his probation officer, probation is not appropriate given the fact that Curry, due to his behaviors, cannot get back in to the Hart House program. The Court likewise feels probation without Curry living at the Hart House is inappropriate. Thus, the Court only has the choice of outright imposition of Curry's prison sentence, or of retaining jurisdiction. Retaining jurisdiction allows Curry to receive some additional programming and stability on his mental health medications and allows Curry and his attorney to have some time to seek re-admission into the Hart House program, or some similar program somewhere else in the State of Idaho.

The sentence imposed on March 16, 2021, was an appropriate sentence given Curry's social and criminal history and the crime for which sentence was imposed. Any lesser sentences would diminish the seriousness of Curry's crime. This Court concludes that the sentence being imposed and the Court retaining jurisdiction, was and is necessary for the protection of society and the deterrence of Curry and others. This Court's decision to place Curry on a period of retained jurisdiction on March 17, 2021, was also necessary for the protection of Curry and society in general.

For the above mentioned reasons, Curry's I.C.R. 35 Motion must be denied without a hearing.

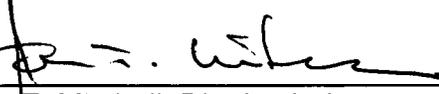
IT IS THEREFORE ORDERED that Curry's I.C.R. 35 Motion is hereby **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, ANDREW JAMES CURRY, 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 11th day of April, 2022.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING

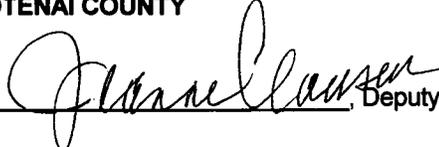
I hereby certify that on the 11th day of April, 2022 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Paul Szott *PAtax@kegov.us*
Kootenai Co. Pros. Attorney *Hilpaibouets@kegov.us*
ANDREW JAMES CURRY
Jus.

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

IDOC NO. 137310

centralrecords@kegov.us

BY:  Deputy