

May 11, 2022, Sentence Disposition, 1. The Court imposed that sentence and committed Kurkowski to the State of Idaho Board of Correction on that date. *Id.* at 2.

On August 12, 2022, Kurkowski, through his attorney, in both cases filed a Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support. Kurkowski 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 modification “to a fixed period of 2 years followed by an indeterminate period of 5 years, or run them consecutive.” *Id.* at 3. This Court can only assume that counsel for Kurkowski meant to request a modification to **concurrent** sentences, because at present Kurkowski’s two sentences run consecutively. Consecutive sentencing would maintain the status quo and would not result in any modification or reduction for Kurkowski.

Counsel for Kurkowski states additional or new evidence consists of: “Client indicates he has been in Nez Perce since his sentencing. He is able to do only very limited programming. He is doing correspondence course called Cage Your Rage. He has been able to do Celebrate Recovery in their jail. He is currently on Zyprexa and Effexor. He has been mentally stable. Additional evidence will likely include testimony from the defendant and possible other individuals, and potentially documentation in support of the defendant’s request.” *Id.* Kurkowski requested a hearing on his I.C.R. 35 Motions. *Id.*

Initially, the Court must determine whether these I.C.R. 35 Motions in each case are timely filed. Idaho Criminal Rule 35 requires that a motion to reduce a sentence must be filed “within 120 days of the entry of the judgment imposing sentence.” I.C.R. 35(b). Prior Idaho appellate case law had consistently found that this time limit is a jurisdictional limit on the power of the sentencing court and that if the time limit has elapsed, the district court has “acted beyond its jurisdiction.” *State v. Salsgiver*, 112 Idaho 933, 935, 736 P.2d 1387, 1389 (Ct. App. 1987). The sentence is imposed when it is pronounced. *Id.* In each of Kurkowski’s cases, the sentence was pronounced on the date of the sentencing hearing in that case, and the judgment was also filed on the same date of the hearing in that case. Very recently, the Idaho Supreme Court reframed this such that “acted beyond its jurisdiction”, might not be the appropriate language moving forward. Instead, “procedural windows” can open, and close, and once the window has closed, the Court does not lose jurisdiction, but rather has acted beyond the “limit of the district Court’s jurisdiction.” *State v. Brown*, 170 Idaho 439, 511 P.3d 859, Docket No. 48305, Slip Opinion 3, 4 (January 6, 2022

In CR28-22-0892, sentence was pronounced on May 11, 2022, and the I.C.R. 35 Motion was filed on August 12, 2022, which is 93 days. Thus, Kurkowski has timely filed in that case.

In CR28-21-3807, sentence was pronounced on April 12, 2022, and the I.C.R. 35 Motion was filed on August 12, 2022, which is 121 days. Thus, Kurkowski has **not** timely filed his I.C.R. 35 Motion in CR28-21-3807. Whether this Court has “lost jurisdiction”, “lacks jurisdiction” or has had its procedural window close on Kurkowski’s I.C.R. 35 Motion in CR-28-21-3807 (per *Brown* above), it does not matter. As set forth in *Brown*, this Court may have the authority, but not the power to hear the I.C.R. 35 Motion in CR28-21-3087. Slip Opinion 3. There is a “*limit* on the district court’s jurisdiction” (*Id.* at 4, italics in original) and this Court will not exceed that limit. Kurkowski’s I.C.R. 35 Motion must be dismissed (or denied) for that reason.

Even though Kurkowski’s I.C.R. 35 Motion was not timely filed in CR28-21-3807, as an alternative basis, Kurkowski’s motion is denied on its merits, or lack thereof. The following analysis of the merits applies to both cases (in CR28-21-3807 only as an alternative basis).

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 Kurkowski’s I.C.R. 35 motion. The Court has also re-reviewed the minutes of the April 12, 2022, sentencing hearing in Kootenai County Case No. CR28-21-3807, and the minutes of the May 11, 2022, sentencing hearing in Kootenai County Case No. CR28-22-0892, and has re-reviewed the pre-sentence report dated and filed on April 5, 2022 in CR28-21-3807 (and the parties agreed could be used for sentencing purposed in CR28-22-0892). This Court finds 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 Kurkowski states in his I.C.R. 35 Motion in both cases he has new evidence for the Court to consider: "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.

However, counsel for Kurkowski fails to state what that testimony might be. This gives this Court no idea of what his evidence would be at any hearing on his I.C.R. 35 motion.

Counsel for Kurkowski also states:

Client indicates he has been in Nez Perce since his sentencing. He is able to do only very limited programming. He is doing correspondence course called Cage Your Rage. He has been able to do Celebrate Recovery in their jail. He is currently on Zyprexa and Effexor. He has been mentally stable.

Id. While this may arguably be new evidence, performance by Kurkowski while in prison is hardly relevant. Kurkowski taking his medications while in custody is hardly relevant. This is so because this Court has worked with Kurkowski for over 12 years, in other felony cases prior to these two currently at issue. It is not what Kurkowski has done while in custody which is relevant (although at the April 13, 2022, hearing in these cases, this Court noted that in those earlier cases the Court relinquished jurisdiction because Kurkowski was selling his medications while on his retained jurisdiction), it is what he has consistently failed to do while not in custody while on probation or while awaiting sentencing, coupled with these two new offenses, which resulted in this Court's imposition of his prison sentence. Of great significance to this Court is the fact that after Kurkowski pled guilty to the charge in Kootenai County Case No. CR28-21-3807, he absconded, and was not found and that bench warrant was not served until just after Kurkowski committed the next new crime in Kootenai County Case No. CR28-22-0892.

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, Kurkowski has not set forth any relevant evidence that could be adduced at hearing on an I.C.R. 35 motion. The Court cannot be required to guess at what relevant evidence Kurkowski might present in support of his Rule 35 Motions. Because Kurkowski has completely failed to give any indication of any relevant facts which would support his claims, his Rule 35 Motion in each case, those motions in each case must be denied due to that failure alone.

There is an additional reason to deny Kurkowski's Rule 35 Motions without a hearing...the relief he seeks. Kurkowski seeks a reduction in the fixed portion of one sentence (Kurkowski asks for a modification of four years fixed to two years fixed only in Kootenai County Case No. CR28-21-3807) and (presumably) a change from consecutive to concurrent sentences in both cases. [This Court can only make an assumption that no such relief (of reduction of the fixed sentence down to two years) is requested in Kootenai County Case No. CR28-22-0892, since Kurkowski already has a two year fixed sentence in that case.] This Court made it clear at the sentencing hearings in both cases that this Court had to do its job and protect the public and could not protect the public with Kurkowski in it. Reducing the fixed portion of the sentence or switching from consecutive to concurrent sentencing (or both) would not allow this Court to fulfill its paramount responsibility, protecting the public.

Thus, there is no relevant evidence that has been presented in support of

Kurkowski's I.C.R. 35 Motions in these two cases which could allow this Court to reconsider its earlier decision to impose the fixed sentences it did and to impose those sentences consecutively. There remains all the evidence to the contrary. Nothing has been presented by Kurkowski that would change any of the facts presented to the Court at his two sentencing hearings.

The sentences imposed on April 12, 2022, in Kootenai County Case No. CR28-21-3807, and on May 11, 2022, in Kootenai County Case No. CR28-22-0892, were appropriate sentences given Kurkowski's social and criminal history, his performance on probation in the past, and the crimes for which these two sentences were imposed. Any lesser sentences would depreciate the seriousness of Kurkowski's crimes. This Court concludes that the sentences imposed were and are necessary for the protection of society, the protection of Kurkowski, and the deterrence of Kurkowski and others.

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

IT IS THEREFORE ORDERED that Kurkowski's I.C.R. 35 Motion is hereby **DENIED** in each case.

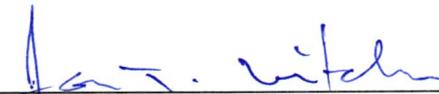
IT IS FURTHER ORDERED the hearing on these motions scheduled for October, 4, 2022, in both cases, is **VACATED**.

NOTICE OF RIGHT TO APPEAL

YOU, RYAN JAMES KURKOWSKI, 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 21st day of September, 2022.



John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of September, 2022 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

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**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: 

Deputy