

contained no briefing or a memorandum on behalf of Berryman. In conclusion in that motion, counsel for Berryman states Berryman, “requests leniency regarding the imposition of her sentence as well as the term of her sentence.” *Id.* at 1. This Court interprets this oblique request as a request for probation and alternatively, for a reduction in her sentence. Counsel for Berryman writes:

Since Misti Berryman’s initial incarceration in February 23, 2022, Misti has undergone a lot of insight to her past trauma, had come up with a safe and stable living environment should she be released, she has stabilized on her medications, and has worked on her unhealthy dependency for her husband. Misti additionally, is on social security disability and due to this benefit has the ability to ensure that she will have access to essential medication that treats her mental health disorders.

Additionally, Misti would like the opportunity to address the court regarding the internal work she has done on behalf of herself...

Id. at 1-2.

Counsel for Berryman has not stated any new evidence that is being presented to support Berryman’s motion. As to Berryman’s period of incarceration (which counsel for Berryman correctly stated began on February 23, 2022), the period of incarceration from February 23, 2022, to October 13, 2022, is by definition, not relevant in an I.C.R. 35 Motion. Anything that happened during that period of time is not new evidence, or additional evidence not available at the time this Court relinquished jurisdiction. *State v. Ramirez*, 122 Idaho 830, 836, 839 P.2d 1244, 1250 (Ct. App.1992). As to the time period from October 13, 2022, to the present, counsel for Berryman is entirely unclear as to what “evidence” might someday be presented in support of Berryman’s I.C.R. 35 Motion. “If the sentence is found to be reasonable at the time of pronouncement, the defendant must then show that it is excessive in view of the additional information presented with the motion for reconsideration.” *State v. Kuhn*, 139 Idaho 710, 717, 85 P.3d 1109, 1116 (Ct. App. 2003). “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.” *State v. Fortin*, 124 Idaho 323, 328, 859 P.2d 359, 364 (Ct. App. 1993). Counsel for Berryman has failed to provide an offer of proof and no affidavit has been filed. In *Fortin*, the movant stated he wished to present the testimony of the passenger of Fortin’s vehicle at the time of the accident, but failed to inform the district court of what the substance of that person’s

testimony would be. *Id.* “This Court (the Idaho Court of Appeals) will not disturb the district court’s discretionary decision without any evidence that the proffered testimony was relevant. Fortin bore the burden of presenting a sufficient record to allow judicial evaluation of the merits of his Rule 35 Motion.” *Id.*, citing *State v. Rundle*, 107 Idaho 936, 937, 694 P.2d 400, 4001 (Ct. App. 1984); *State v. Ramirez*, 122 Idaho 830, 839 P.2d 1244 (Ct. App. 1992). An offer of proof is governed by Idaho Rule of Evidence 103. To be effective, an offer of proof must include evidence of all the specific facts which the offered evidence tends to establish, rather than mere argumentative conclusions, and must include any foundational evidence necessary to establish the admissibility of the evidence in question. *State v. Parker*, 112 Idaho 1, 3, 730 P.2d 921, 923 (1986), citing *The Boise Association of Credit Men, Ltd. v. United States Fire Ins. Co.*, 44 Idaho 242, 261, 256 P. 523, 526 (1927). Counsel for Berryman has not in any way provided this Court with an offer of proof.

Even if counsel for Berryman provided an offer of proof, the description of what areas Berryman would like to discuss at a hearing on her I.C.R. 35 motion would not be relevant, because it is not new evidence. All of these areas were discussed at sentencing and at her jurisdictional review hearing. As set forth above, counsel for Berryman states Berryman would like to discuss the areas of:

[Berryman] has undergone a lot of insight to her past trauma, had come up with a safe and stable living environment should she be released, she has stabilized on her medications, and has worked on her unhealthy dependency for her husband. Misti additionally, is on social security disability and due to this benefit has the ability to ensure that she will have access to essential medication that treats her mental health disorders.

Additionally, Misti would like the opportunity to address the court regarding the internal work she has done on behalf of herself...

Mot. for Leniency 1-2. Each of these has been discussed previously by Berryman. At Berryman’s April 12, 2022, arraignment hearing, at which she pled guilty and agreed to go on a period of retained jurisdiction and the Court reviewed the presentence report previously prepared for Kootenai County Case No. CR2016-7043 (Tr. 4:3-5:16), and at which Berryman was sentenced, Berryman discussed a “safe and stable living environment should she be released”, as her counsel at the time stated:

After the Court retains jurisdiction and assuming that Ms. Berryman is allowed that opportunity on probation, she continues to have support in the community from her family, that they’re willing to be there for her, wanting to help

her out. They are also looking into the Good Samaritan program upon her return as a potential possibility. Nevertheless, I think it's important for the Court to know that there is still continued support in the community for Ms. Berryman even if the Court retains jurisdiction today.

Tr. 14:18-15:2. (Berryman has appealed this Court's decision and in that process a transcript of relevant proceedings has been prepared). Berryman herself stated in her right of allocution:

After my rider program I do, as we discussed, have a strong support system waiting here for me with my parents. They have invited me to come live with them again. My financial resources are here. My medical resources are here. My medication management resources are here and, um – and in this community as well I know what resources are here for relapse therapy, for outpatient therapy, for meetings and recovery resources. I also have other family here in this area like my sister, my brother-in-law and my other family that are good for me, and as well as the Good Samaritan program which we have funding to and we did have a date, uh, set up for next month, so they have already screened me. I have already been interviewed, and I've already been accepted to go into directly right after the rider program if the State grants me that. I have resources with them as well.

Tr. 16:9-25. As to the issue that Berryman would like to address in her I.C.R. 35 Motion, that, Berryman “has undergone a lot of insight to her past trauma” (Mot for Leniency 1), such has been discussed over the years between this Court and Berryman, and it was discussed specifically and directly by this Court to Berryman at her April 12, 2022, arraignment and sentencing hearing: “You need to work on past trauma, mental health treatment, and you need additional chemical dependency treatment [while on this period of retained jurisdiction]. Tr. 19:16-18. This Court also has great familiarity with Berryman, as this Court was assigned to Kootenai County Case No. CR2016-7043 on April 26, 2016, when Berryman waived her preliminary hearing and was bound over to District Court. In her Presentence Report in CR2016-7043, Berryman disclosed physical abuse. Presentence Report 7. In that case, when this Court sentenced Berryman on September 7, 2016, term and condition of probation No. 26. Reads: “You have been accepted into Kootenai County Mental Health Court, you must successfully complete that program. Must be assessed for past trauma and treat if needed NLT 11/1/16.” Sentencing Disposition, Terms and Conditions of Probation 2, ¶ 26. This Court then saw Berryman in Mental Health Court weekly from September 7, 2016, until Berryman graduated from that program on May 2, 2019. In between those dates, Berryman was sent by this Court on a period of retained jurisdiction from November 17, 2016, to June 8, 2017, for violating the

No Contact Order, for which she was terminated from Mental Health Court on November 10, 2016. In this Court's November 17, 2016, Probation Violation Disposition, this Court stated Berryman must "Work on past trauma". Probation Violation Disposition, 2. Following that period of retained jurisdiction, Berryman re-entered Mental Health Court and graduated from that program. There is nothing "new" about Berryman's past trauma, this Court's awareness of such, and this Court's insistence that Berryman treat that past trauma. All of this had been known to this Court for over seven years when this court relinquished jurisdiction in this current case.

As to the issue that Berryman would like to address in her I.C.R. 35 Motion, that, "Additionally, Misti [Berryman] would like the opportunity to address the court regarding the internal work she has done on behalf of herself..." (Mot. for Leniency 2), such topic is so nebulous that the Court is incapable of deciphering what Berryman would even want to discuss, and even more incapable of understanding any relevance to such topic.

As to the issue that Berryman would like to address in her I.C.R. 35 Motion, that, "Misti additionally, is on social security disability and due to this benefit has the ability to ensure that she will have access to essential medication that treats her mental health disorders" (Mot. for Leniency 2), that was discussed at the April 12, 2022, arraignment and sentencing hearing. Tr. 20:10-16.

As to the issue that Berryman would like to address in her I.C.R. 35 Motion, that, Berryman "has worked on her unhealthy dependency for her husband" (Mot. for Leniency 2), such is irrelevant as Berryman at the time of sentencing, at the time jurisdiction was relinquished, and currently, has a no contact order with her husband. That was discussed at the April 12, 2022, hearing. This Court stated:

THE COURT: It [the no contact order] ends February 24th, 2023, so it's in effect. If you correspond to Chad Berryman, I will send you to prison and I won't have a hearing, so do you understand that the no-contact order is in effect?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you have any contact with him out at the jail or in prison, I'm imposing your sentence. There won't be a hearing. Are we clear?

THE DEFENDANT: I am clear.

Tr. 23:23-24:7. In spite of having the ability to exercise its discretion and relinquish jurisdiction without a hearing, this Court, in an abundance of caution and to give Berryman all benefit, held a hearing on October 13, 2022. At that hearing, it was proven by the plaintiff that Berryman had violated the no contact order with her husband by

talking with him 93 times while on the retained jurisdiction program for 185 days, and attempting to contact him on 584 occasions. Tr. 34:10-25.

Finally, while Berryman in her Motion for Leniency does not request a hearing (as is usually the practice), this Court exercises its discretion and finds that no hearing is necessary.

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 if 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 Berryman’s I.C.R. 35 motion. The Court has also re-reviewed the entire transcript (prepared for the appeal Berryman filed on November 16, 2022) of the April 12, 2022, arraignment and sentencing hearing, the October 13, 2022, jurisdiction review hearing. The court has re-reviewed the pre-sentence report dated July 25, 2016, and filed on July 26, 2016, in the older case, CR2016-7043.

All the evidence before this Court when it sentenced Berryman on April 12, 2022, and when it relinquished jurisdiction on October 13, 2022, was that Berryman had committed two very violent crimes in recent years. On April 13, 2016, Berryman admitted to taking a gun and pointing it at him [Chad Berryman, her husband] demanding her phone, as part of a physical domestic dispute. CR2016-7043 Presentence Report 3. Mr. Berryman had more observable damage done to his person than Misti Berryman. *Id.* In the present case, on February 23, 2022, Berryman stabbed Chad Berryman in the arm with such force that it broke the knife which had a five inch handle and an 8 inch blade. Affidavit in Support of Probable Cause 3. “The blade of the knife broke off in Chad’s arm near the entryway of their residence.” *Id.* at 4. Berryman’s crimes occur when she has used methamphetamine and is not taking her mental health medications. Unfortunately,

Berryman has shown a propensity to not take her mental health medications, use methamphetamine, and commit extremely violent acts. Berryman simply poses an incredible risk to the public.

Berryman's I.C.R. 35 Motion gives this Court no idea of what Berryman's new evidence would be at any hearing on his I.C.R. 35 motions. Counsel for Berryman really only speculated as to what types of evidence might be presented, and even then, nothing new is listed as being presented at a hearing. Indeed, no hearing was even requested.

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

There is an additional reason to deny Berryman's Rule 35 Motion without a hearing...the relief she seeks. As set forth above, counsel for Berryman states the relief Berryman requests as, "leniency regarding the imposition of her sentence as well as the term of her sentence." Mot. for Leniency 1. This Court will address each of Berryman's requests.

Berryman seeks a reduction in the term of her sentence, without even making the claim that the sentence imposed was in any way unreasonable. Nor can she. Berryman entered into a pretrial settlement offer knowing that the plaintiff, state of Idaho, would be recommending a ten-year fixed sentence followed by a ten-year indeterminate sentence. Pretrial Settlement Offer 1, filed April 6, 2022. Additionally, Berryman fails to mention what Berryman feels a more appropriate sentence might be. Neither stating how much of a reduction she desires, nor why the sentence imposed was unreasonable, Berryman is simply asking this court to guess. This Court specifically finds that reducing any of the fixed portion of Berryman's sentence in this case, would not allow this Court to fulfill its paramount responsibility, protecting the public. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Berryman's prior serious offense, and her present crime, and in spite of all the treatment she has been given, Berryman's proclivity to stop taking her mental health medications and return to using methamphetamine, all set forth above, are testament to that incontrovertible fact that the public in general, and Chad Berryman in specific, cannot be protected from Berryman.

Berryman also seeks probation rather than imposition of her prison sentence. This also flies in the face of this Court's paramount obligation to protect the public via its sentencing decisions. It simply defies logic for Berryman to even claim she is a good candidate for probation when: Berryman committed this new very serious crime of Aggravated Battery with Use of a Deadly Weapon, *after* having recently completed Mental Health Court and after committing another serious crime in 2016, and then, after being sentenced to a retained jurisdiction on April 12, 2022, on this new crime, and specifically being warned at that hearing that if she violated said no contact order she would have her prison sentence imposed without a hearing (Tr. 23:23-24:7), Berryman then violated that order 93 times while on the retained jurisdiction program for 185 days (nearly every other day), and attempting to contact Chad Berryman on 584 occasions (three times a day average over those days). Tr. 34:10-25. Berryman violated that no contact order without being under the influence of methamphetamine, and while being

administered her mental health medications. Berryman simply cannot help herself. She cannot control her actions even while being monitored in a controlled prison environment. Probation is simply out of the question. Berryman has proven time and again that she cannot adhere her conduct to our laws while in prison. This Court finds that probation would not only be antithetical to this Court's duty to protect the public, it would severely depreciate the seriousness of Berryman's current offense, her prior offense, it would not deter Berryman or others similarly situated from committing similar crimes in the future, and it would not in any way sufficiently punish Berryman for this current offense and subsequent repeated violations of the no contact order. Berryman has proven to this Court her undeniable inability to be rehabilitated. None of the *Toohill* factors ("(1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment") would be met by such a preposterous outcome of probation. 103 Idaho at 568, 650 P.2d at 710.

The sentence imposed by this Court on Berryman on April 12, 2022, was an appropriate sentence given Berryman's social and criminal history, and the fact that many of her crimes and especially the instant offense, involve violence and human victims. The instant offense is a serious crime, the victim was seriously stabbed by Berryman. Any lesser sentence would depreciate the seriousness of Berryman's current crime. This Court concludes that the sentence imposed was and is necessary for the protection of society, the protection of the public from Berryman, and the deterrence of Berryman and others. Berryman's criminality is getting worse, not better. There was really nothing for this Court to do but relinquish its jurisdiction and impose Berryman's reasonable prison sentence on October 13, 2022. Nothing at all has been presented by Berryman to change that fact.

For the above mentioned reasons, Berryman's I.C.R. 35 Motion (Motion for Leniency) in this case must be denied without a hearing.

IT IS THEREFORE ORDERED that Berryman's I.C.R. 35 Motion (Motion for Leniency) in this case is hereby **DENIED**.

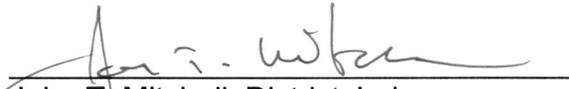
NOTICE OF RIGHT TO APPEAL

YOU, MISTI MARIE BERRYMAN, 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.

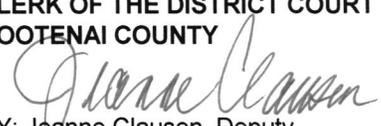
YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an

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 13th day of February, 2023.


John T. Mitchell, District Judge

I hereby certify that on the 13th day of February, 2023 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:
Defense Attorney – Kristen Pearson *K.pearson.law@gmail.com*
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**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: Jeanne Clausen, Deputy