

STATE OF IDAHO)
 County of KOOTENAI)
 FILED 8/13/2023)
 AT 10:25 O'clock A.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,)
)
 Plaintiff,)
)
 vs.)
)
RAY DAVID ROSALES)
)
 DOB: 12/06/1991)
)
 SSN: XXX-XX-0697)
)
 IDOC: 101168)
)
 Defendant.)

Case No. **CR28-22-7402**

**MEMORANDUM DECISION AND
 ORDER DENYING DEFENDANT'S
 MOTION FOR MODIFICATION OF
 SENTENCE PURSUANT TO I.C.R. 35,
 AND NOTICE OF RIGHT TO APPEAL**

On October 19, 2022, in Kootenai County Case CR28-22-6499, before the Honorable John T. Mitchell, District Judge, RAY DAVID ROSALES (Rosales), appeared for a sentencing hearing. Also appearing was Arthur Verharen, Deputy Prosecuting Attorney for Kootenai County, Idaho and Rosales' lawyer, Chris Schwartz. At that hearing, this Court sentenced Rosales as follows:

DOMESTIC BATTERY WITH TRAMATIC INJURY, (a felony), I. C. 18-903, 18-918(2), committed on May 14, 2022 – to the custody of the Idaho State Board of Correction for a fixed term of NINE (9) years followed by an indeterminate term of ONE (1) year, for a total term not to exceed TEN (10) years.

CR28-22-7402 Sentencing Disposition 1. The Court imposed that sentence and did not retain jurisdiction. *Id.* at 1-2.

On January 31, 2023, Rosales, through his attorney, timely filed a Motion for Modification of Sentence Pursuant to I.C.R. 35. That motion also contained briefing or a memorandum on behalf of Rosales. In that motion, counsel for Rosales stated his "motion is made as a plea for leniency." Mot. for Modification of Sentence 1. Counsel for Rosales wrote: "MR. ROSALES plans on presenting new information in the form of testimony that he believes that he could be successful on probation. Further, he intends to testify regarding the support system that he has in place if he is given probation." *Id.* at 2. Counsel for Rosales states the relief Rosales requests as, "that this Court consider suspending the sentence and placing the defendant on probation or in the alternative

reducing the fixed portion of his sentence.” *Id.*

Counsel for Rosales has not stated any new evidence that is being presented to support Rosales’ motion. As mentioned, counsel for Rosales simply avers, “MR. ROSALES plans on presenting new information in the form of testimony that he believes that he could be successful on probation. Further, he intends to testify regarding the support system that he has in place if he is given probation.” *Id.* Simply stating that the defendant “intends” to testify about his support system does not give this Court any idea of what new evidence might be shown at such a hearing. Additionally, this topic is nothing new. Rosales, in his right of allocution on October 19, 2022, told this Court that, “I believe that I would be a good candidate for probation.” Tr. 39:5-6. That conclusion by Rosales was supported by his claims that he is a good worker. Tr. 39:1-5. The additional basis that Rosales “intends to testify regarding the support system that he has in place if he is given probation” is neither specific in what new evidence Rosales now has, and that topic (his support system) is likewise, nothing new. At the October 19, 2022, sentencing hearing, Rosales, in his right of allocution, explained exactly whom his support system was comprised:

With that being said, with all things being considered, I do believe I have done somewhat of a good job. I have a very substantial support system from my parents, my sisters, brothers, brother-in-laws, cousins, aunts, uncles, grandparents, friends and co-workers and even my boss. Some of my support is here today to show support and have been here for all my other court dates.

Tr. 38:19-25.

Finally, in Rosales’ I.C.R. 35 Motion, counsel for Rosales requested a hearing on Rosales’ I.C.R. 35 Motion. Mot. for Modification of Sentence 2.

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 Rosales’ I.C.R. 35 motion. The Court has also re-reviewed the transcript (prepared for the appeal Rosales filed on November 2, 2022) of the entire October 19, 2022, sentencing hearing. The court has re-reviewed the pre-sentence report dated and filed in this case on August 15, 2022. That presentence report detailed Rosales’ Battery With Intent to Commit a Serious Felony, committed on August 26, 2009, for which Rosales was sentenced to three and a half years fixed and six and a half years indeterminate (Presentence Report 3), and that sentence was imposed. *Id.* at 5. The presentence report for that August 26, 2009, crime, is attached to the Presentence Report for the instant crime. *Id.* at 102-116. A review of that document shows that Rosales (then four months shy of the age of 18, but charged as an adult) and others, forced a 15-year-old runaway girl perform oral sex upon them, while she was naked in a park in Coeur d’Alene (Tubbs Hill), and against her will. *Id.* at 103. Rosales was paroled after four years in prison for this Battery With Intent to Commit Serious Felony, but returned back to prison for committing the crime of Battery with Intent to Commit Rape. *Id.* at 5. While in prison following that crime, Rosales committed nine disciplinary offenses (*Id.*), the IDOC reports of which were attached to the presentence report. *Id.* at 70-77. In spite of that, Rosales made parole on August 27, 2014. *Id.* at 5. The report continues:

Shortly after his release to parole, the defendant violated by staying out past curfew and associating with a known felon. Although he was advised not to associate with known felons, he continued to do so. On November 18, 2014, law enforcement informed the defendant was intoxicated, involved in a fight at a bar, and reportedly had a sawed-off shotgun and an AK-47 rifle in the truck [trunk] of a car.

In November 2014, information was received that the defendant was entering a home without permission while the homeowners were on vacation. He crawled through the pet door to gain access to the home and was having parties. The homeowner’s daughter went into the home to feed the dog and found the defendant, his girlfriend and another female sleeping in the house. She also found cans and bottles of alcohol all over the house.

Id. All of this occurred between two to three months after Rosales made parole. *Id.* Yet, it took the IDOC and the Commission of Pardons and Parole another six months to revoke Rosales’ parole and get him back into prison. *Id.* Following which, Rosales remained in prison until his full term release date. *Id.* After that release, Rosales

committed the crime of Fighting in Public on two separate occasions, April 22, 2021, and June 4, 2021. *Id.* at 4. Three days later he committed another battery. *Id.* Six months later he committed the crime Malicious Injury to Property. *Id.* The police reports of these crimes are attached to Rosales' Presentence Report. *Id.* at 22-61. Six months after that last crime of violence, on May 14, 2022, Rosales committed the felony crime Domestic Battery with Traumatic Injury for which this Court sent Rosales to prison. *Id.*

All the evidence presented to this Court showed that Rosales consistently commits crimes which have devastating effect on his victims and that Rosales poses an incredible risk to the public. The crimes Rosales has committed frequently involve violence, they usually involve physical control over others and an aura of superiority over others, especially females. Most of Rosales crimes, including the instant offense, involve serious violence after consumption of a lot of alcohol.

Rosales' I.C.R. 35 Motion gives this Court no idea of what Rosales' new evidence would be at any hearing on his I.C.R. 35 motions. Counsel for Rosales only speculated as to what types of evidence might be presented, writing, "MR. ROSALES plans on presenting new information in the form of testimony that he believes that he could be successful on probation. Further, he intends to testify regarding the support system that he has in place if he is given probation." Mot. for Modification of Sentence 2. Simply enumerating the source of testimony (MR. ROSALES) which may potentially be presented ("plans on presenting"), is not enough at this I.C.R. 35 juncture.

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, Rosales 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 evidence Rosales might present at a hearing in support of his Rule 35 Motion. Because Rosales has completely failed to give any indication of any relevant facts which would support his claims in his Rule 35 Motion, that motion must be denied due to that failure alone.

There is an additional reason to deny Rosales' Rule 35 Motion without a hearing...the relief he seeks. As set forth above, counsel for Rosales states the relief Rosales requests as, "that this Court consider suspending the sentence and placing the defendant on probation or in the alternative reducing the fixed portion of his sentence." Mot. for Modification of Sentence 2. This Court will address each of Rosales' requests.

Rosales seeks a reduction in the fixed portion of his sentence, without even making the claim that the sentence imposed was in any way unreasonable. Additionally, Rosales fails to mention what Rosales feels a more appropriate sentence might be. Neither stating how much of a reduction he desires, nor why the sentence imposed was unreasonable, Rosales is simply asking this court to guess. This Court specifically finds that reducing any of the fixed portion of Rosales' 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). Rosales' past crimes, his present crime, his performance in prison and his performance on parole, all set forth above, are testament to that incontrovertible fact.

Rosales also seeks probation rather than imposition of his prison sentence. This also flies in the face of this Court's paramount obligation to protect the public via its sentencing decisions. For Rosales to commit the serious crime of Domestic Battery With Traumatic Injury, *after* having recently committing four crimes of violence, those crimes

being committed *after* having topped out on his most recent prison sentence, defies logic. Rosales has proven time and again that he cannot adhere his conduct to societies laws while on parole, while on probation or 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 Rosales' current offense, it would not deter Rosales or others similarly situated from committing similar crimes in the future, and it would not in any way sufficiently punish Rosales for this current offense. Rosales has proven to this Court his 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 Rosales on October 19, 2022, was an appropriate sentence given Rosales' social and criminal history, and the fact that many of his crimes and especially the instant offense, involve violence and human victims. The instant offense is a serious crime, the victim was seriously beaten and Rosales has no recollection of it due to his intoxication. Any lesser sentence would depreciate the seriousness of Rosales' current crime. This Court concludes that the sentence imposed was and is necessary for the protection of society, the protection of the public from Rosales, and the deterrence of Rosales and others. Rosales' criminality is getting worse, not better. There was really nothing for this Court to do but impose Rosales' reasonable prison sentence on October 19, 2022. Nothing at all has been presented by Rosales to change that fact.

For the above mentioned reasons, Rosales' I.C.R. 35 Motion in this case must be denied without a hearing.

IT IS THEREFORE ORDERED that Rosales' I.C.R. 35 Motion in this case is hereby **DENIED**.

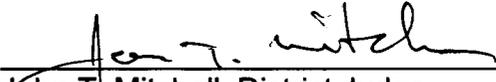
NOTICE OF RIGHT TO APPEAL

YOU, RAY DAVID ROSALES, 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 – Chris Schwartz *Schwartz law service*
Kootenai Co. Pros. Attorney *hepaicourts@hepa.us*
RAY DAVID ROSALES
IDOC NO. 137310 *centralrecords@hepa.us*

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY


BY: Jeanne Clausen, Deputy