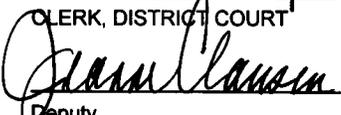


STATE OF IDAHO)
 County of KOOTENAI)
 FILED 5/22/23)
 AT 12:00 O'clock P. M.
 CLERK, DISTRICT COURT

 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,)
)
 Plaintiff,)
)
 vs.)
)
 ZACHARIAH ELIJAH WELKE)
)
 DOB: 05/18/1995)
)
 SSN: XXX-XX-)
)
 IDOC: 146553)
)
 Defendant.)
)
 _____)

Case No. **CR28-22-14756**

**MEMORANDUM DECISION
 AND ORDER DENYING
 I.C.R. 35 MOTION AND
 DENYING MOTION FOR
 MODIFICATION OF
 SENTENCE**

I. MEMORANDUM DECISION.

On January 23, 2023, in Kootenai County Case No. CR28-22-14756, before the Honorable John T. Mitchell, District Judge, you, ZACHARIAH ELIJAH WELKE (Welke), appeared for sentencing. Also appearing were a representative of the Prosecuting Attorney for KOOTENAI County, Idaho and your lawyer, Doug Phelps. At that hearing, the Court imposed the following sentence:

TRAFFICKING IN METHAMPHETAMINE OR AMPHETAMINE (greater than 28g), (a felony), I. C. 37-2732B(a)(4)(A), committed on September 5, 2022 – to the custody of the Idaho State Board of Correction for a fixed term of FOUR (4) years followed by an indeterminate term of SEVEN (7) years, for a total term not to exceed ELEVEN (11) years.

January 23, 2023, Sentence Disposition, 1. The Court imposed that sentence and committed Welke to the custody of the State of Idaho Board of Correction on that date. *Id.* at 2-3. On May 18, 2023, Welke, through his attorney, Doug Phelps, timely filed a “Rule 35 Motion for Reconsideration of Sentence.” That document shows Welke, through his attorney, specifically requests relief under I.C.R. 35(c). Rule 35 Mot. for Recons. of Sentence 1. Idaho Criminal Rule 35(c) regards “Credit for Time Served”, and when Welke’s I.C.R. 35 Motion is read in context, he is not making a Motion for Credit for Time Served. The Court presumes Welke’s attorney made an error and cited the wrong subsection of I.C.R. 35.

Welke, through his attorney, claims, “However, the defendant believes that the sentence imposed was illegal and requests this court to correct the sentence.” *Id.* at 2. Simply “believing” something to be the case is not sufficient to support a motion under I.C.R. 35(b). An “illegal sentence” is governed by I.C.R. 35(a). However, without ever citing I.C.R. 35(a), in spite of clearly claiming in his I.C.R. 35 Motion that this Court imposed an “illegal sentence”, counsel for Welke shifts gears and discusses I.C.R. 35(b), “sentences imposed in an illegal manner or reduction of sentence.” This Court presumes Welke’s attorney intended to make a motion pursuant to I.C.R. 35(b). Idaho Criminal Rule 35(b) reads in pertinent part:

Within 120 days of the entry of the judgment imposing sentence an order releasing retained jurisdiction, a motion may be filed to correct a sentence that has been imposed in an illegal manner or to reduce a sentence and the court may correct or reduce the sentence.

The fatal problem with Welke’s motion made under I.C.R. 35(b) is that Welke’s attorney has presented absolutely no evidence. Welke’s failure to present any new evidence gives this Court absolutely no basis upon which to grant an I.C.R. 35(b) motion. Welke specifically did not ask for a hearing on his I.C.R. 35 Motion. Rule 35 Mot. for Recons. of Sentence 2. The failure of Welke’s attorney to either a) request a hearing or b) to present evidence within his motion is fatal under I.C.R. 35(b). Had Welke requested a hearing and presented this Court with some idea of what new evidence Welke based his motion upon, the Court would have likely had an obligation to provide a hearing before denying any motion made under I.C.R. 35. 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). “The 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).

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, Welke 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 Welke could have presented in support of his Rule 35 Motion. Because Welke has completely failed to give any indication of any relevant facts which would support his claims, his Rule 35 Motion must be denied due to that failure alone.

Finally, counsel for Welke makes an argument that would seem that Welke’s motion is made under I.C.R. 35(a), “illegal sentences”, as counsel for Welke argues:

A defendant may seek to correct a sentence imposed illegally.

* * *

The defendant contends that the sentence imposed was illegal because it failed to comply with the due process rights guaranteed to him under the United States and Idaho constitutions. Specifically, the defendant was not given adequate notice of the alleged violation, was not provided with a neutral and detached tribunal, was not allowed to confront, and cross-examine adverse witnesses, and was not provided with a written statement explaining the evidence relied on and the reason for revoking parole. The defendant believes these violations of his due process rights rendered his sentence illegal and request that this court correct the sentence

accordingly. I.C.R. Rule 35.

Rule 35 Mot. for Recons. of Sentence 2. It would seem that counsel for Welke has simply “lifted” a paragraph from another motion made previously involving some other client, as none of the allegations in that paragraph find any basis of reality in the present case. First, this Court was not “revoking parole” on Welke. This Court **sentenced** Welke, and only the Idaho Commissions of Pardons and Parole (and not any court) could revoke a person’s parole. Second, the claim that “the defendant was not given adequate notice of the alleged violation” sounds like a probation violation hearing, which did not occur in this case. Again, Welke was **sentenced**, he was never placed on probation. The claim that Welke “was not provided with a neutral and detached tribunal”, without more context, is just simply legal words run together.

More importantly, even if some of these allegations in the above paragraph had some basis in reality (that is, were supported by *any* evidence), a motion under I.C.R. is not the appropriate mechanism to bring a constitutional challenge. A motion under this rule (I.C.R. 35) was not an appropriate vehicle for multi-pronged constitutional attack on the conditions of defendants’ confinement. *State v. Roach*, 112 Idaho 173, 175, 730 P.2d 1093, 1095 (Ct. App. 1986). Allegations attacking the validity of defendant’s conviction are beyond the scope of a motion under this rule. Other remedies, such as appeal or a petition for post-conviction relief, are available to set aside a wrongful conviction. A motion under this rule serves a narrower purpose. It subjects only the sentence to reexamination. *Housley v. State*, 119 Idaho 885, 889, 811 P.2d 495, 499 (Ct. App. 1991).

Welke’s sentence was not illegal. There is a mandatory minimum sentence for trafficking in methamphetamine (over 28 grams) under I.C. §37-2732B(a)(4)(A), and that is that three-years fixed must be imposed. This Court imposed four years fixed. The mandatory minimum requirement has been met. The potential maximum sentence for trafficking in methamphetamine (over 28 grams) under I.C. 37-2732B(a)(4)(B) is up to life. This Court imposed a total sentence of eleven years, well within the “life” maximum.

Again, it is unclear which subsection of I.C.R. 35 Welke’s motion is truly brought. No matter which subsection though, Welke’s I.C.R. 35 motion is based on no evidence, no cogent legal argument, is totally devoid of any foundation, and is frivolous.

For the above mentioned reasons, Welke’s I.C.R. 35 Motion must be denied.

II. ORDER.

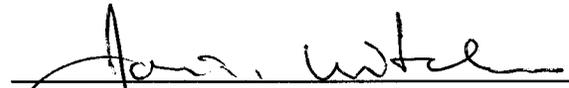
IT IS THEREFORE ORDERED that Welke's I.C.R. 35 Motion is hereby **DENIED**.

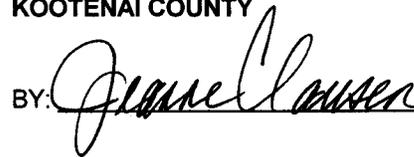
NOTICE OF RIGHT TO APPEAL

YOU, ZACHARIAH ELIJAH WELKE, 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 May, 2023.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING
I hereby certify that on the 22nd day of May, 2023 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:
Defense Attorney – Doug Phelps phelpsephelps@aut.com
Kootenai Co. Pros. Attorney kepaicourts@kcgov.us
ZACHARIAH ELIJAH WELKE
IDOC NO. 146533
central records @ idoc.idaho.gov
CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY:  Deputy