

STATE OF IDAHO)
 County of KOOTENAI)
 FILED 8/1/2023)
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 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.)
)
 RICHY CHARLES KELLEY)
 DOB: xx/xx/1967)
 SSN: xxx-xx-3252)
 IDOC: 68121)
)
 Defendant.)

Case No. **CR28-21-7490**
CR28-23-3263

**MEMORANDUM DECISION AND
 ORDER DENYING I.C.R. 35
 MOTION AND NOTICE OF
 RIGHT TO APPEAL**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On May 2, 2021, defendant Richy Charles Kelley (Kelley) committed the crimes of felony Aggravated Assault in violation of I.C. § 18-901, 18-905, and misdemeanor Battery, I.C. 18-903. Am. Information 1-2. This was amended down from two counts of Aggravated Battery and two counts of Battery. Information 1-2; Criminal Compl. 1-2. The pretrial settlement offer limited the plaintiff to recommend no more than a retained jurisdiction at sentencing. Pretrial Settlement Offer 1. His Presentence Report recommended a retained jurisdiction, Level I inpatient drug treatment, and assessed Kelley as a “high” risk to reoffend, given his LSI score of 33. Presentence Report, 3, 10, 18. In that Presentence Report, Kelley’s described the May 2, 2021, crimes, to which Kelley pled guilty, as follows:

On 05/01/2021 I was driking [sic] beer most of the day. At 4:30 p.m. Samantha Seymor walked by me in the hall at my mom’s house I told her not to smoke pot at mom’s house, Linda Porter. Samantha Seymor is 19 years old. It’s unlawful to have pot in ID. Samantha told me to F—k off. It’s not my house. That’s when I waved a unopen knife at her and said watch your mouth. I kill When Samantha came back from the police station Sam

said to me that she was glad that my son took his life, that's when I called her a F.in "lesbine/Dike!" When I turned my back Samantha jumped on my back + choked me out to the ground. Samantha ran to Linda Porters room after letting me go. I did not call the police on her. Instead I picked up my pocket knife when to moms room. Mom said Sam took off as I broke the door off the hindges. Sam came out of the closet and came at me. I pulled my knife out for protection. I ran at her too. I waved the knife at her and said I will stab you if you hurt me agin. I walked away + Samantha choked me out agin. Sam said citisons arest. Then Linda Porte called the police. When I drank I locked the doors so that Sam doesn't get hurt. For her own safety with al do reaspect. Sam is not a resident were I live.

Id. at 2. Samantha is Kelley's neice, and Linda Porter is Kelley's mother. *Id.* According to the Presentence Report, as of the date of committing these new crimes on May 2, 2021, Kelley's criminal record consisted of: Battery/Domestic Violence in Las Vegas, Nevada on November 16, 1993; Battery/Domestic Violence in Las Vegas, Nevada on May 5, 1998; Driving Under the Influence in Nez Perce County, Idaho on November 13, 2001; Driving Without Privileges on December 7, 2001 in Nez Perce County; Driving Under the Influence in Nez Perce County on April 18, 2002; Felony Driving Under the Influence in Nez Perce County on August 13, 2002; Possession of a Controlled Substance in Nez Perce County on January 18, 2004; Felony Driving Under the Influence in Nez Perce County on September 21, 2010; Invalid License in Kootenai County on April 25, 2011; and an Invalid License in Nez Perce County on June 29, 2015. *Id.* at 11-13.

According to the presentence report:

The defendant claimed his first contact with law enforcement was at the age of 22 for Domestic Violence. He denied any juvenile arrests or convictions and has never attempted to escape from a youth detention facility.

In discussion of his past criminal convictions, the defendant reported he was arrested for Trespassing in Denver, Colorado when he went onto his ex-girlfriend's property to retrieve his tools after he they had broken up. He indicated he spent two days in jail.

The defendant acknowledged some of his previous criminal history is related to the use of alcohol and admitted he needs help for his addiction. He has previously been convicted of two misdemeanors for Driving Under the Influence and two felony convictions of Driving Under the Influence. He

indicated he was sent on a Traditional Rider in 2005, after his felony conviction for Driving Under the Influence.

According to the defendant, he has been charged with Battery/Domestic Violence during his relationship with Ms. Norma Kelley. He claimed the charges were a result of verbal arguments only and claimed they were not physical. The defendant stated he was charged with Battery/Domestic Violence when he and Ms. Kelley lived in Nevada in 1998 and reported he was sentenced to six months in jail. He stated he recalled one incidence when his wife came home intoxicated and ripped an earring out of his ear. The defendant stated he pushed her on the bed and her son called the police. He indicated he received the charge of Domestic Violence, was sentenced to jail time, and was ordered to attend domestic violence classes. The defendant reported he completed the classes on domestic violence. He stated he has been placed on supervision in the past; however, he explained it was several years ago and could not recall the name of his Probation Officer. The defendant listed he received a probation violation for a "bad U.A." and described his experience on probation as "good."

According to the Idaho Department of Correction records, On May 31, 2006, Probation Officer D. Farmer reported "I received two phone messages from Norma Kelley, Offender's ex-wife and previous victim (not for instant crime). She stated Offender has been calling her and harassing her." Officer D. Farmer stated, Ms. Kelley said she hung up on him because she was tired of listening to him. She claimed the defendant "called back approx. 2 minutes later, screaming and hollering." Ms. Kelley told Probation Officer Farmer she didn't want him to call and stated, "he broke her teeth and dislocated her jaw before." Probation Officer Farmer referred her to the Lewiston Police Department to file a report.

The Idaho Department of Correction records reflect, on May 31, 2006, the defendant came into the office of Probation and Parole and met with Probation Officer Arnzen. The supervision note stated the defendant had a "very poor attitude." Probation Officer Arnzen reported observing the defendant's cell phone and saw where he had called his ex "three times." The defendant admitted to drinking "½ bottle of nyquil because he couldn't sleep."

According to the Idaho Department of Correction records, on June 1, 2006, Probation Officer J. Arnzen spoke with the defendant who admitted to "dinking a 40oz beer the night he called his wife, and admitted that she didn't call him first." Probation Officer Arnzen indicated he scheduled the defendant for a polygraph on June 6, 2006. Probation Officer Arnzen reported the defendant's polygraph was reviewed and he "admitted to drinking beer 5-7 times to the point of intoxication, not the one time that he admitted to." Probation Officer Arnzen spoke with the defendant on June 13, 2006 and he admitted to "harassing" his ex-wife and wrote a written statement.

The Idaho Department of Correction records reflect, the defendant was arrested on an Agent's Warrant on January 5, 2012, for failing to stay for a urine sample after group on January 5, 2012. Probation Officer C. Hoiland reported the defendant stated he fled because he was scared and had "only one beer on New Years eve/day and that people there were smoking pot, and that he had a brownie." The defendant reported he doesn't know if it had anything in it. "He said that he doubted his ua would come back dirty as he has been trying really hard to flush his system since then."

* * *

The Idaho Department of Correction records reflect, the defendant admitted to Probation Officer J. Hanchet to the use of marijuana on April 26, 2013.

* * *

The Idaho Department of Correction records reflect, the defendant received a sanction for "Possession of illegal substances or controlled substances w/o prescription" on September 8, 2015. Probation Officer J. Hanchet reported the defendant admitted to using marijuana during the past month of August on a "sporadic basis."

According to the Idaho Department of Correction records, on November 21, 2015, Probation Officer Neal was contacted by Lewiston Police Department Officer Dammon who reported the defendant had been involved in a domestic disturbance "where he was acting out violently, and at the time of arrest he was under the influence of alcohol and received a new possession of marijuana."

The Idaho Department of Correction records reflect, on November 23, 2015, Probation Officer J. Hanchet filed a Probation Violation on the defendant for "marijuana and alcohol use" and "new misdemeanor charge."

According to iCourt, the defendant has pending charges for No Contact Order Violation in CR28-21-14061. Officer Josh Reneau's case summary states, "On 07/14/21, Samantha M. Seymour called and reported her uncle, Richy C. Kelley has been frequently calling his mother, Linda K. Porter, in violation of a No Contact order put in place after Richy was arrested for aggravated assault on Linda in May. When contacted by LE, Linda confirmed Richy has called her several times from jail, with the most recent time being this morning."

According to iCourt, the defendant was arrested on a Warrant for Violation of a No Contact Order, related to case CR28-21-14061. The Warrant Return of Service is dated August 12, 2021 and the defendant is currently incarcerated at the Kootenai County Public Safety Building with a bond of \$10,000.

Id. at 12-16.

On August 24, 2021, this Court sentenced Kelley to five years fixed, zero years

indeterminate, and this Court retained jurisdiction. Sentencing Disposition 1. Kelley did not do well on his period of retained jurisdiction, as was set forth in his Addendum to Presentence Report (which provided input from Idaho Department of Corrections [IDOC] on the inmate's performance while on the period of retained jurisdiction), which was filed on April 8, 2022. As a result, at a hearing held on April 21, 2022, this Court continued Kelley on his period of retained jurisdiction for up to the full year, so that Kelley could put together a decent disciplinary record and prove that he might be an acceptable candidate for probation. April 21, 2022, Retained Jurisdiction Disposition 1-2. On August 3, 2022, IDOC filed a supplemental report which recommended probation. On August 11, 2022, this Court held another jurisdictional review hearing, and at the conclusion of that hearing, placed Kelley on four years of supervised probation. August 11, 2022, Retained Jurisdiction Disposition, 1-2. On February 16, 2023, IDOC filed a Special Progress Report explaining that Kelley's whereabouts were unknown and that IDOC was unable to supervise Kelley on probation. On February 22, 2023, this Court issued a Bench Warrant for Kelley's arrest. Two days later, that warrant was served on February 24, 2023.

On February 21, 2023, a Criminal Complaint was filed which initiated Kootenai County Case No. CR28-23-3263, in which Kelley was charged with two counts of felony Violating a No Contact Order, I.C. §18-920(3), both for events occurring on February 18, 2023. One charge was for violating with protected person Samantha Seymour and one charge was for violating with protected person Linda Porter. Criminal Compl.1-2. On March 29, 2023, Kelley signed a pretrial settlement offer to one felony count of Violation of a No Contact Order, with open recommendation by the plaintiff, and a recommendation for concurrent sentencing with the probation violation in CR28-21-7490. Pretrial Settlement Offer 1. At his arraignment on March 29, 2023, Kelley pled guilty to one count of Violation of a No Contact Order pursuant to that Pretrial Settlement Offer. At his

probation violation disposition hearing in CR28-21-7490, and his sentencing hearing in CR28-23-3263, this Court sentenced Kelley to two years fixed followed by three years indeterminate in CR28-23-3263, and revoked Kelley's probation and imposed the five-year fixed sentence based on the probation violation in CR28-21-7490. The Court imposed the sentences in each case.

On July 25, 2023, Kelley, through his attorney, in each of these two cases, timely filed a "Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support" (I.C.R. 45(b) Motion). In that I.C.R. 35(b) Motion, Kelley, through counsel, requests this Court "to modify Richy Charles Kelley's sentence and for the Court to retain jurisdiction in the matter." I.C.R. 35(b) Motion 2. Counsel for Kelley claims, "The basis for such argument consists of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his future." *Id.* Counsel for Kelley claims, "Additional evidence will include a new comprehensive diagnostic assessment regarding Mr. Kelley's current substance abuse and mental health treatment needs, testimony from the defendant and possible other individuals, and potentially documentation in support of defendant's request." *Id.* at 3. Counsel for Kelley requested a hearing in his I.C.R. 35 Motion. *Id.*

Kelley's I.C.R. 35 motion in each case must be denied without a hearing based on the following.

II. ANALYSIS.

A. KELLEY'S I.C.R. 35 MOTION MUST BE DENIED BECAUSE KELLEY HAS STATED NO NEW EVIDENCE.

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). "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, Kelley 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 Kelley could have presented in support of his Rule 35 Motion. Because Kelley 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.

As set forth above, Kelley's counsel's claim that, "The basis for such argument consists of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his future" (I.C.R. 35(b) Mot. 2) is not any evidence, it is simply argument, a baseless one at that. Such argument, is nothing more than a throw away sentence which tells this Court absolutely nothing. The sentence has become *de rigueur* in the local legal defense community. As pointed out by this Court on July 11, 2023, in *State v. Mitch Michael Curtis, Jr.*, Kootenai County Case No. CRF 2014 18896, where the defendant Curtis in that case was represented by Jonathan Williams, the same deputy public defender as in Kelley's case (referring back to a case decided on June 26, 2023, in *State v. Alyssa Duncan*, Kootenai County Case No. CR28-23-3250, where the defendant Duncan was represented by a different deputy public defender):

Duncan's counsel [a different public defender than Jonathan Williams] writes, "The basis for such argument consist of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his [her] future.' I.C.R. 35(b) Mot. 2. That phrase tells the Court not one thing. Such phrase is not any new evidence at all. It is really a throw away line that is currently being used in most I.C.R. 35(b) Motions, whether from the Kootenai County Public Defender's Office or from other counsel. As an example, this Court in *State v. Brandon Louis Rice*, CR28-21-13988, in this Court's Memorandum Decision and Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, filed in that case on June 12, 2023, this Court noted that defense counsel in that case gave the argument, "The basis for this Motion consists of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his future." Mem. Decision and Order 3. The attorney quoted in that decision who wrote essentially verbatim sentence, was not from the Kootenai County

Public Defender's Office.

Duncan, Mem. Decision and Order 2-4. The “direct and collateral negative impact” argument has been a worn out phrase used in nearly every I.C.R. 35(b) motion filed before this Court for quite some time. While not only thread-bare, the argument comprises no new evidence, which is what is needed by Kelley at this I.C.R. 35 juncture. Kelley has provided no evidence, and most importantly, has provided no new evidence.

The closest Kelley comes to explaining “new” evidence, is when counsel for Kelley forecasts what might be presented. Kelley’s attorney writes: “Additional evidence will include a new comprehensive diagnostic assessment regarding Mr. Kelley’s current substance abuse and mental health treatment needs, testimony from the defendant and possible other individuals, and potentially documentation in support of defendant’s request.” *Id.* at 3. If the new diagnostic assessment exists, counsel needed to attach it. If the new diagnostic assessment did not exist at the time of the filing of Kelley’s I.C.R. 35(b) Motion (July 25, 2023), and does not now exist as of the date of this decision, (August 7, 2023), then any such document does not exist within the 120-day time period under I.C.R. 35(b).

Finally, the statement that “possible other individuals” (*Id.*) might testify, is not evidence. There is no indication in the I.C.R. 35(b) Motion about what testimony Kelley or any other witness might provide at any hearing on Kelley’s I.C.R. 35 Motion. The Court cannot be made to guess at this juncture who the “possible other individuals” might be, let alone what they might testify about.

Kelley has stated no new “evidence”, he has only stated his desire to be placed on a retained jurisdiction and/or to have his sentence reduced. Not only is there no “evidence” provided by Kelley, he has not set forth even a cogent “reason” why he should be placed on a retained jurisdiction and/or have his sentence reduced, based on any new

evidence. 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).

There are some State of Idaho appellate cases which discuss whether the evidence presented in an I.C.R. 35(b) motion must be “new” evidence. One of those cases is *State v. Campbell*, 170 Idaho 232, 509 P.3d 1161 (May 16, 2022). In that case, the Idaho Supreme Court held:

The district court did not abuse its discretion in denying the Rule 35(b) motion for leniency. In Campbell's original Rule 35 motion, he stated that “additional information” showed that he was at a greater risk of violence in adult prison and that rehabilitation efforts would be thwarted by the current sentence, citing a wide range of both legal and scientific articles regarding juvenile offenders published between 1994 and 2017. In denying Campbell's motion, the district court effectively concluded that this information was not new because it had already considered Campbell's age at sentencing.

The information presented by Campbell was not “new” in that it did not pertain specifically to his case or culpability. See e.g., *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In *Huffman*, this Court considered a motion for leniency where the “new” information presented by the defendant consisted of “statements made by the parole board when revoking his parole” on a prior sentence. *Id.* Such information specifically related to the defendant himself and his criminal punishments. *Id.* Here, Campbell merely presented research regarding juvenile offenders that existed long before Campbell's criminal conduct occurred. As we concluded above, the district court fully considered Campbell's youth and its potential mitigation at sentencing; consequently, additional information regarding Campbell's juvenile status was not new information for purposes of Rule 35(b). As such, we conclude that the district court did not abuse its discretion in denying Campbell's Rule 35(b) motion.

170 Idaho at 246, 509 P.3d at 1175. Just as in *Campbell* and *Huffman*, Kelley's argument that service of his prison sentence will have “direct and collateral negative impact a sentence of the current nature places upon the defendant and his future” (I.C.R. 35(b) Mot. 2) is not “new” evidence, and even the argument itself is not related to any of

the *Toohill* factors.

Another case discussing whether the evidence must be “new” is *State v. Smith*, 161 Idaho 162, 384 P.3d 409 (Ct. App. 2016), in which the Idaho Court of Appeals held:

In presenting a Rule 35 motion, a defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). Thus, any colorable merit to a Rule 35 motion must arise from new or additional information presented in the motion or accompanying documentation that would create a basis for reduction of the sentence. *Wade*, 125 Idaho at 525, 873 P.2d at 170. **A Rule 35 motion that does not present such new information is not one that a reasonable person with adequate means would bring before the district court at his or her own expense and is, therefore, frivolous.** *Carter*, 157 Idaho at 903, 341 P.3d at 1272. Moreover, a Rule 35 motion is frivolous if the basis for the claim was previously considered by the district court. *Carter*, 157 Idaho at 902–03, 341 P.3d at 1271–72.

161 Idaho at 164, 384 P.3d at 411. (bold added). This Court specifically finds that Kelley’s I.C.R. 35(b) motion presents no new information, and no relevant information.

Accordingly, under *Smith*, Kelley’s I.C.R. 35(b) motion is frivolous. This Court finds that no reasonable person with adequate means would bring such an I.C.R. 35(b) motion before the district court at his or her own expense. Kelley’s doing so is not reasonable.

The Idaho Court of Appeals concluded in *Smith*:

Alternatively, *Smith* argues that the district court abused its discretion in denying his Rule 35 motion on the merits. A motion for reduction of sentence under Rule 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *Huffman*, 144 Idaho at 203, 159 P.3d at 840.

As discussed above, the information *Smith* provided in support of his Rule 35 motion was information that was already in his possession and already considered by the district court in imposing *Smith*’s sentence. Because *Smith* provided the district court with no new or additional information to support finding *Smith*’s sentence excessive, we

conclude no abuse of discretion has been shown. Therefore, the district court's order denying Smith's Rule 35 motion is affirmed.

161 Idaho at 165-66, 384 P.3d at 412-13. Kelley has presented this Court with no new evidence. That failure alone is reason for this Court to deny Kelley's I.C.R. 35(b) Motion without holding a hearing.

Finally, counsel for Kelley has completely failed to indicate what sort of relief Kelley seeks in his I.C.R. 35 Motion. As set forth above, counsel for Kelley requests this Court "to modify Richy Charles Kelley's sentence and for the Court to retain jurisdiction in the matter." I.C.R. 35(b) Motion 2. By use of the word "modify" in the phrase "modify Richy Charles Kelley's sentence", is Kelley asking for a reduction in his sentence? If so, which one? Both? By use of the word "and" in the phrase "and for the Court to retain jurisdiction" is Kelley only asking for a retained jurisdiction, or is Kelley asking for a reduction in his sentence (or sentences) and a retained jurisdiction? Again, this Court cannot be required to guess at the relief Kelley seeks in his I.C.R. 35 Motion. This Court will analyze all requested relief.

B. KELLEY'S I.C.R. 35 MOTION MUST BE DENIED ON THE MERITS (OR LACK THEREOF).

Given Kelley's prior felony criminal record which consists of multiple domestic violence crimes and alcohol crimes, both of which were at play in the Aggravated Assault and Battery in CR28-21-7490, given the disturbing nature of the crimes in that case and given the fact that Kelley committed additional crimes in CR28-23-3263 **while on felony probation** in CR28-21-7490 and after having just served a period of retained jurisdiction in that case, given Kelley's abysmal failure while on probation in CR28-21-7490 and prior periods of supervised probation at times over the past 30 years, given the dismal performance Kelly had on his most recent period of retained jurisdiction, and given the extreme danger Kelley presents to the public and especially his victims, for Kelley to even

suggest that he is entitled to any reduction in his sentence, or a period of retained jurisdiction, is the pinnacle of temerity.

The Court exercises its discretion and decides Kelley's I.C.R. 35(b) motion without a hearing. This Court finds absolutely no new evidence and no relevant evidence has been presented by counsel for Kelley in support of his I.C.R. 35(b) Motion in either of his two cases.

This Court specifically finds that neither reducing Kelley's sentence nor placing Kelley on a period of retained jurisdiction, 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). In *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982), the Idaho Court of Appeals set forth the factors a Court should consider in imposing a sentence: "(1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment." *Id.*

Kelley' current crime in CR28-21-7490, and his commission of new crimes in CR28-23-3263 while on supervised felony probation, his past similar crimes involving domestic violence and crimes of alcohol abuse and addiction, his dismal performance his recent period of retained jurisdiction, his failures while on supervised probation most recently and in the past, all set forth above, are testament to that incontrovertible fact. Specifically, this Court finds that a period of retained jurisdiction would only be a waste of public resources (at least two prior periods of retained jurisdiction have produced no long-term changes in the Court's ability to protect the public from Kelley), and even if a period of retained jurisdiction were to be utilized, this Court would still not be able to protect the public, its paramount duty under *Toohill*. At Kelley's April 6, 2023, sentencing hearing in CR28-23-3263, and probation violation disposition hearing in CR28-21-7490, this Court

told Kelley: "I'm not going to retain jurisdiction", "I wanted to see if there was any way I could justify a retained jurisdiction", "There is nothing in the last two years that would make me think you would obey a single order", "Your decision to not listen to these orders, you will kill someone", "I'm not comfortable with you on probation", "You are going to do whatever you want to do", "I don't see the benefit of a retained jurisdiction, I can't get there in your cases." April 6, 2023, Court Minutes, 11:52:57-12:02:17. Nothing has been presented since that April 6, 2023, hearing to change any of those findings of this Court.

III. ORDER.

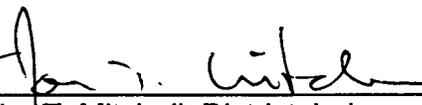
IT IS HEREBY ORDERED that defendant **RICHY CHARLES KELLEY's I.C.R. 35(b)** motion in each case is **DENIED** for the reasons set forth above: Kelley has submitted no new evidence, and Kelley's motion is devoid of any merit.

NOTICE OF RIGHT TO APPEAL

YOU, RICHY CHARLES KELLEY, 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 7th day of August, 2023.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of August, 2023 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Prosecuting Attorney – Stan Mortensen *Replicon@ke.gov.us*
Defense Attorney – Jonathan Williams *pd@ke.gov.us*

Idaho Department of Correction
Records Division (certified copy)
Fax: (208) 327-7445

RICHY CHARLES KELLEY
IDOC # 68121
Centralrecords@idoc.idaho.gov

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY:  Deputy