

STATE OF IDAHO )  
 County of KOOTENAI )  
 FILED 8/18/2023 )  
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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. )  
 )  
**MICHAEL BRUCE JOHNSON** )  
 DOB: xx/xx/1979 )  
 SSN: XXX-XX- )  
 IDOC: 144881 )  
 )  
 Defendant. )

Case No. **CR28-22-17202**

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

**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.**

On November 15, 2022, in Kootenai County Case No. CR28-22-1702, this Court conducted an arraignment hearing for defendant Michael Bruce Johnson (Johnson), at which he pled guilty to felony Driving under the Influence, for a crime Johnson committed on October 7, 2022. The Court also conducted an admit/deny hearing on a probation violation in Kootenai County Case No. CR28-21-10527 (for which he was on probation for another felony DUI, this one committed on June 19, 2021), at which Johnson admitted violating his probation by committing the new felony crime. This Court sentenced Johnson in CR28-22-17202 to six years fixed, four years indeterminate, for a total sentence of ten years. Judgment and Sentence 2. In CR28-22-17202, this Court also suspended Johnson’s driver’s privileges as follows:

**IT IS FURTHER ORDERED** that IN CR28-22-17202 your driving privileges shall be absolutely suspended for a FIVE (5) year period following your incarceration (if placed on probation, the period of your absolute suspension of driving privileges begins UPON RETURN FROM YOUR RETAINED JURISDICTION IF GRANTED PROBATION), **AND THIS FIVE (5) YEAR SUSPENSION RUNS CONSECUTIVE TO THE FIVE YEAR SUSPENSION PREVIOUSLY IMPOSED IN CR28-21-10527**

and you shall surrender all driver's licenses in your possession to the Court.

*Id.* at 3. (bold in original). In both CR28-22-17202, and the older case, CR21-21-10527, this Court sent Johnson on a period of retained jurisdiction pursuant to I.C. § 19-2601.

On June 22, 2022, at a jurisdictional review hearing, this Court placed Johnson on a three-year period of supervised probation in both cases. Retained Jurisdiction Disposition 1-2. The Court also made clear that the five-year license suspension in CR28-22-17202, set forth above, began on June 22, 2022. However, it is important to note that the five-year license suspension in CR28-22-17202, set forth above, was imposed on November 15, 2022.

On August 3, 2023, Johnson, through his attorney, Jonathan Williams, in CR28-22-17202 only, filed a "Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support" (I.C.R. 35(b) Motion). There is no I.C.R. 35(b) Motion filed by Johnson in CR28-21-10527. In the I.C.R. 35(b) Motion in CR28-22-17202, Johnson, through counsel, requests this Court, as "a plea for leniency" (I.C.R. 35(b) Motion 1) to "modify the period of suspension of driving privileges to a 1 year period and to run it concurrent to the suspension of driving privileges in CR28-21-10527." *Id.* at 3. Johnson asks this Court for no other relief; there is no request to modify the sentence imposed in that case.

In the I.C.R. 35(b) Motion in CR28-22-17202, counsel for Johnson writes:

The basis for such argument consists of the direct and collateral negative impact the 5 year period of restriction of driving privileges, consecutive to the 5 year restriction in CR28-21-10527, as part of defendant's sentence places on the defendant by severely restricting his ability to get to probation meetings and provide for his family due to defendant residing in Pavillion, Wyoming, and that location being remote and totally lacking in public transportation or alternative transportation options. Defendant cannot readily rely on family or friends for a 10 year total period to provide transportation due to those family members or friends having employment and schedules of their own.

*Id.* at 2. Then, Counsel for Johnson writes:

Additional evidence will likely include testimony from the defendant and from his current probation explaining where defendant resides, where the probation office is located in relation to defendant's residence, and transportation options in the area. Further evidence to likely include documentation related to defendant's current employment and location of his employment in relation to his residence.

*Id.* at 3.

Based on the following, Johnson's I.C.R. 35 motion in CR28-22-17202 must be denied without a hearing.

## II. ANALYSIS.

### A. JOHNSON'S I.C.R. 35 MOTION MUST BE DENIED BECAUSE IT IS UNTIMELY FILED.

As pointed out above, the five-year absolute suspension of Johnson's driving privileges, was imposed on November 15, 2022. At the time it was imposed on November 15, 2022, it was pointed out that such five-year period of absolute suspension of Johnson's driving privileges would begin at the jurisdictional review hearing **if, and only if**, Johnson were placed on probation at that hearing. What is undeniable is the fact that the five-year period of driving privilege suspension was imposed on November 15, 2022, and the **date** that such five-year period **began** to run was disclosed by the Court on June 22, 2023.

Idaho Criminal Rule 35(b) reads:

Within 120 days of the entry of the judgment imposing sentence **or 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.

I.C.R. 35(b). (bold added) In his I.C.R. 35(b) motion on behalf of Johnson, counsel for Johnson did not discuss the issue as to whether Johnson's motion is time-barred. This Court must assume that counsel for Johnson either gave the untimeliness issue no thought, or, if thought was given to the issue, Johnson's counsel must have thought the

this Court's order entered on June 22, 2023, is an "order releasing retained jurisdiction." This Court finds as a matter of law and fact, that it is not. This Court finds as a matter of law, that on June 22, 2023, this Court placed Johnson on a period of supervised probation. That ended the period of retained jurisdiction. On June 22, 2023, this Court did **not** relinquish its jurisdiction over Johnson. On June 22, 2023, this Court did not leave Johnson in the custody of the State of Idaho Board of Correction to serve the remainder of his prison sentence. Most pertinently, given the language of I.C.R. 35(b), this Court did not enter an "order releasing retained jurisdiction" on June 22, 2023. This Court's June 22, 2023, Retained Jurisdiction Disposition and Notice of Right to Appeal reads:

IT IS HEREBY ORDERED that, pursuant to I.C. §19-2601,  
That the execution of your previously imposed sentence be suspended and you  
are placed on supervised probation for a period of THREE (3) years...

Retained Jurisdiction Disposition 1. Thus, this Court finds the language "order releasing retained jurisdiction" found in I.C.R. 35(b) is not applicable in Johnson's case, because this Court in fact never entered an "order releasing retained jurisdiction" in Johnson's case. That being so, Johnson's time to file his I.C.R. 35(b) motion was, "Within 120 days of the entry of the judgment imposing sentence." Judgment imposing Johnson's sentence occurred on November 15, 2022. There can be no dispute about that. Johnson had 120 days from that date within which to file his I.C.R. 35 Motion. That 120-day period ended on March 15, 2023. Johnson filed his I.C.R. 35(b) Motion in CR28-22-17202 on August 3, 2023. Accordingly, such filing by Johnson is 141 days too late. Johnson's I.C.R. 35(b) Motion in CR28-22-17202 is time barred. *State v. Omev*, 112 Idaho 930, 736 P.2d 1384 (Ct. App. 1987) makes this clear. The district judge in *Omev* retained jurisdiction for 120 days. 112 Idaho at 931, 736 P.2d at 1385. At that time, retained jurisdiction under I.C. §19-2601(4) was limited to 120 days. It was later expanded to 180

days and later still expanded to the present 365 days. “At the close of the 120-day period, the district judge conducted a hearing, suspended the sentence, and placed Omei on intensive probation.” *Id.* The Court of Appeals continued:

Unfortunately, Omei’s performance was not satisfactory. His probation was revoked within a month. The district judge ordered the previously suspended sentence to be executed. Approximately two months later, Omei moved under Rule 35 for a reduction of sentence. The motion was filed more than 120 days after the sentence originally had been pronounced. However, the motion was filed less than 120 days after the period of retained jurisdiction had ended and less than 120 days after probation had been revoked.

The Idaho Court of Appeals in *Omei* held: “We conclude that the 120-day period for filing a Rule 35 Motion began to run in this case when the ten-year sentence was pronounced and suspended.” 112 Idaho at 932-33, 736 P.2d at 1386-87. The “suspended” language may seem a first glance to be applicable to Johnson’s situation, where the Court on June 22, 2023, “suspended” Johnson’s prison sentence and placed him on supervised probation, but it is not. Explicit in *Omei* is the fact that the Rule 35 Motion was filed before 120 days had expired from the 120-day period under I.C. §19-2601(4) had ended. 112 Idaho at 931, 736 P.2d at 1385. Implicit in *Omei*, due to the use of the word “suspended”, is the fact that the Rule 35 Motion was filed more than 120 days after Omei was placed on probation by the district court. Additionally, at the time, I.C.R. 35 read differently as compared to its present language. The Court in *Omei* discussed the fact that Idaho’s Criminal Rule 35 was “derived from its federal counterpart” (112 Idaho at 932, 736 P.2d at 1386), and noted that 120 days specifically ran from when the sentence was “imposed”, but also noted that until 1983 federal courts were split on whether imposition would include revocation of probation, and that in 1983, congress amended the federal rule to specifically allow for the 120 period to run from a revocation of probation. *Id.* As the Idaho Court of Appeals in *Omei* noted: “In pertinent part, Rule

35 allows a court to reduce a legal sentence ‘within 120 days after the sentence is imposed’ or ‘upon revocation of probation as provided by law.’” 112 Idaho at 931, 736 P.2d at 1385. Currently, a motion under I.C.R. 35 following a revocation of probation must be made with 14 days of revoking probation. I.C.R. 35(b). In any event, **this Court has not revoked Johnson’s probation** in CR28-22-17202, this Court has simply placed Johnson on probation on June 22, 2022. Thus, under I.C.R. 35(b), the only beginning date pertinent to Johnson’s suspension of driving privileges, is 120 days **from the date this Court imposed Johnson’s prison sentence** (November 15, 2022), and retained jurisdiction.

The very next case reported after *Omey* helps clarify that when a court places a defendant on probation at a retained jurisdiction hearing, there is no extension of the 120-day time limit found in I.C.R. 35(b). In other words, when probation is granted by a court at a jurisdictional review hearing, there is no attachment of a new 120-day period which starts to run the date of that jurisdictional review hearing. Under the current wording of I.C.R. 35(b), there is attachment of a new 120-day period to the date of the jurisdictional review hearing, but **only when the court relinquishes jurisdiction**, or, per the language of I.C.R. 35(b), **only when the Court enters an “order releasing retained jurisdiction.”** The case that follows *Omey* is *State v. Salsgiver*, 112 Idaho 933, 736 P.2d 1387 (Ct. App. 1987). In *Salsgiver*, the Idaho Court of Appeals held that even when retained jurisdiction has been relinquished, the 120-day limit under I.C.R. 35(b) is not “aggregated” to the 180 days (at that time) time period for retained jurisdiction under I.C. §19-2601(4). 112 Idaho at 933, 934-35, 736 P.2d at 1387, 1388-89. That harsh result has currently been alleviated through subsequent changes to I.C.R. 35(b) by the Idaho Supreme Court, but only where retained jurisdiction has been “released” or relinquished, not when a retained jurisdiction results in a court granting probation. The reasoning for

that harsh result in *Salsgiver* is worth noting. In *Salsgiver*, the Idaho Court of Appeals wrote:

We recognize that it may seem anomalous to bar Rule 35 motions more than 120 days after the original pronouncement of sentence and the retention of jurisdiction. After all, the retained jurisdiction period consumes at least 120 days; occasionally, it consumes more. No time is left for a Rule 35 motion unless it is filed while jurisdiction is still being retained. But this is unlikely. Where a court retains jurisdiction, there is a substantial possibility that the defendant may never serve the sentence pronounced. By retaining jurisdiction, a court indicates that it is still considering the option of probation. It makes little sense for a defendant to file a motion to reduce his sentence before the probation decision has been made. Not only is the motion premature but it may irritate a judge upon whose good graces the defendant depends.

We further recognize that our interpretation of Rule 35, consistent with the Supreme Court decisions discussed above, may leave the motion to reduce a sentence with no meaningful function in a retained jurisdiction case. However, the apparent loss of potential relief under Rule 35 is offset in some measure by the power inherent in retained jurisdiction itself. Although I.C. § 19–2601(4) contains no explicit reference to reducing a sentence, we see no reason why a court, exercising the jurisdiction it has retained, may not reduce a sentence earlier pronounced. If the Rule 35 motion is essentially a plea for leniency, *see, e.g., State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct.App.1984), then a similar plea may be made to the court when it decides whether to relinquish jurisdiction.

112 Idaho at 934-35, 736 P.2d at 1388-89. In the present case, with the absolute suspension of a defendant's license, that absolute suspension is not only not "unlikely", it is in fact **mandated** by statute. The Idaho legislature has taken away a court's discretion not to impose at least a one year suspension of a defendant's driving privileges when sentencing for a felony DUI under I.C. §18-8005(6)(d). Under that statute, this Court has no discretion to not impose at least the statutory one year mandatory minimum period of absolute suspension of a defendant's driving privileges for felony driving under the influence. That is made clear in *State v. Steelsmith*, 153 Idaho 577, 288 P.3d 132 (Ct. App. 2012).

This result that, as it pertains to the issue of suspension of driving privileges, the 120-day period under I.C.R. 35(b), begins the date sentence is **imposed**, is also borne

out by the fact that at a jurisdictional review hearing, this Court has the discretion to either place a defendant on probation, or “release” its “retained jurisdiction” (commonly referred to the court “relinquishing” its “retained jurisdiction” to the Idaho Department of Corrections). That is the extent of this Court’s discretion at the jurisdictional review hearing. Those are the only two choices a court has at a retained jurisdiction hearing; either suspend the prison sentence and place the defendant on probation, or, relinquish the court’s jurisdiction to the Idaho Department of Correction. At a jurisdictional review hearing on a felony DUI charge, this Court **does not** have the discretion, to impose any driver’s license suspension (other than the mandatory minimum one year absolute suspension of driving privileges). In other words, if this Court were to “forget” to impose any driver’s license suspension at the time it initially imposed defendant’s sentence, subsequently imposing any more than the mandatory minimum at the jurisdictional review hearing is illegal. The case of *State v. Steelsmith*, 153 Idaho 577, 288 P.3d 132 (Ct. App. 2012) makes that clear. In *Steelsmith*, the District Judge did not “forget” to address suspension of driving privileges at sentencing. Instead, he errantly thought he could take up that issue at Steelsmith’s jurisdictional review hearing. The Idaho Court of Appeals noted, “At the sentencing hearing, the district court indicated that it would ‘defer imposition of costs, fines and other assessments,’ and ‘defer deciding on a driver’s license suspension’ until a review hearing to be held at the end of the period of retained jurisdiction.” 153 Idaho at 579-80, 288 P.3d at 134-35. At the jurisdictional review hearing, the district court suspended Steelsmith’s driving privileges for a period of three years pursuant to I.C. § 18–8005(6)(d). 153 Idaho at 580, 288 P.3d at 135. Claiming the district court lacked jurisdiction to impose the three year driver’s license suspension at that time, Steelsmith then filed an I.C.R. 35 Motion contesting the imposition of the three year suspension of driving privileges, which the district judge denied. *Id.* Steelsmith

appealed. On appeal, Idaho Court of Appeals noted, “The State asserts [in the State’s interpretation of I.C. §19-2601(4)], however, that Steelsmith’s sentence was not executed until the district court relinquished jurisdiction, months after the sentencing hearing, and therefore the court continued to possess jurisdiction to enhance the sentence throughout the retained jurisdiction term.” 153 Idaho at 580-81, 288 P.3d at 135-36. The Idaho Court of Appeals noted it exercised free review over statutory interpretation (153 Idaho at 581, 288 P.3d at 136), and held:

Contrary to the State’s argument, by its plain language, I.C. § 19–2601(4) does not provide that execution of a sentence is *postponed* until the conclusion of the retained jurisdiction period. Rather, it allows the court to *suspend* the execution of the judgment after that execution has begun, at any point “during the first three hundred sixty-five (365) days of a sentence to the custody of the state board of correction.” That is, a sentence is in execution while a defendant is serving the sentence in the custody of the Board of Correction during the period of retained jurisdiction. The sentence remains in execution unless during the retained jurisdiction period, the court takes affirmative steps to suspend the sentence and place the defendant on probation. See *Williams*, 126 Idaho at 44, 878 P.2d at 218 (stating that a court may “suspend further execution of the judgment pursuant to Section 19–2601(4)” (emphasis added)).

The State relies upon language in *State v. Ditmars*, 98 Idaho 472, 473, 567 P.2d 17, 18 (1977), and *State v. Salsgiver*, 112 Idaho 933, 934, 736 P.2d 1387, 1388 (Ct.App.1987), that implies that execution of a sentence is postponed until a court relinquishes jurisdiction under I.C. § 19–2601(4). However, the language upon which the State relies is dicta. The issues addressed in *Ditmars* and *Salsgiver* concerned whether a sentence is imposed when it is initially pronounced or when the court relinquishes jurisdiction, not whether the sentence is executed at that time. As noted above, in *McGonigal* and *Williams*, which were decided after *Ditmars* and *Salsgiver*, Idaho appellate courts held that a sentence is executed when the defendant has been placed in the custody of the Board of Correction. Therefore, notwithstanding any dicta in *Ditmars* or *Salsgiver*, we hold that when the district court retains jurisdiction under Section 19–2601(4), the sentence is executed upon the transfer of the defendant to the Board of Correction, even though that custody is subject to possible subsequent suspension of the balance of the sentence. It follows that the district court was without power to increase Steelsmith’s sentence after his transfer of custody to the Board of Correction unless a statute or rule authorized the court to do so.

The district court here was plainly of the view that Section 19-2601(4) itself authorized the court to increase Steelsmith’s sentence at the jurisdictional review hearing. Thus, we are presented with the question whether this statute broadly extends a court’s jurisdiction for all purposes, or whether it authorizes the sentencing court only to suspend the defendant’s sentence and to place the

defendant on probation during the period in which jurisdiction is retained.

The primary purpose of the statute is to enable the trial court to obtain additional information regarding the defendant's rehabilitative potential and suitability for probation. *State v. Petersen*, 149 Idaho 808, 812, 241 P.3d 981, 985 (Ct. App.2010); *State v. Lee*, 117 Idaho 203, 205, 786 P.2d 594, 596 (Ct. App.1990); *State v. Toohill*, 103 Idaho 565, 567, 650 P.2d 707, 709 (Ct. App.1982). **The only action that the statute authorizes the court to take during the period of retained jurisdiction is to "suspend the execution of the judgment and place the defendant on probation." We therefore conclude that when a court retains jurisdiction under I.C. § 19-2601(4), the extension of "jurisdiction" is limited to jurisdiction for the court to suspend the sentence of imprisonment and impose terms of probation. The statute did not authorize the court here to add fines, costs, and a driver's license suspension to Steelsmith's judgment of conviction after the judgment was entered and executed.**

153 Idaho at 581-82, 288 P.3d at 136-37. (bold added). The Idaho Court of Appeals then discussed the mandatory one-year license suspension in the context of remedying an "illegal sentence" under I.C.R. 35.

A suspension of driving privileges under this section [I.C. § 18-8005(6)(d)] is mandatory, and therefore Steelsmith's original sentence was illegal to the extent that it did not include a license suspension. However, only a one-year suspension is made mandatory by Section 18-8005(6)(d); any suspension of driving privileges beyond the one-year minimum is discretionary. Because Rule 35(a) permits a court to increase a sentence only insofar as necessary to correct an illegality, see *State v. Mendenhall*, 106 Idaho 388, 394, 679 P.2d 665, 671 (Ct. App.1984), it did not authorize a suspension of Steelsmith's license beyond the one-year mandatory minimum term.

153 Idaho at 582, 288 P.3d at 137. The Idaho Court of Appeals then concluded:

We vacate...the three-year suspension of Steelsmith's driver's license, and remand with instructions to the district court to amend Steelsmith's judgment of conviction to suspend his driving privileges for one year from his release from imprisonment.

153 Idaho at 584, 288 P.3d at 139. *Steelsmith* makes it clear the only discretionary act this Court can perform at a jurisdictional review hearing, "is limited to jurisdiction for the court to suspend the sentence of imprisonment and impose terms of probation." 153 Idaho at 582, 288 P.3d at 137. Idaho Code §19-2601(4) "did not authorize the court here to add...a driver's license suspension". *Id.*

Finally, this Court notes that the Idaho Court of Appeals in *State v. Coniconde*, 166 Idaho 164, 168, 456 P.3d 530, 534 (Ct. App. 2019), held that Idaho Code §18-8005(4)(e) mandates, or “requires driver’s license suspensions for subsequent driving under the influence convictions commence upon release from incarceration” (that is, the court *lacks discretion* to have the suspension begin on imposition of sentence), whereas license suspension under Idaho Code § 49-1404(3) for felony eluding does not have such a “mandate”, therefore, the sentencing court has discretion as to whether to begin such license suspension, either upon release from custody or at the time sentence is imposed.

Because this Court lacks the discretion to impose Johnson’s license suspension at any time other than imposition of sentence (which occurred on November 15, 2022), and Johnson has waited beyond 120 days from that date to file his I.C.R. 35(b) motion, this Court lacks jurisdiction to hear that motion. Johnson’s I.C.R. 35(b) motion is time-barred. The next two reasons for denying Johnson’s I.C.R. 35(b) motion are discussed only as alternative grounds.

**B. JOHNSON’S I.C.R. 35 MOTION MUST BE DENIED BECAUSE JOHNSON 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, Johnson 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 Johnson could have presented in support of his Rule 35 Motion. Because Johnson 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, Johnson's counsel's claim that:

The basis for such argument consists of the direct and collateral negative impact the 5 year period of restriction of driving privileges, consecutive to the 5 year restriction in CR28-21-10527, as part of defendant's sentence places on the defendant by severely restricting his ability to get to probation meetings and provide for his family due to defendant residing in Pavillion, Wyoming, and that location being remote and totally lacking in public transportation or alternative transportation options. Defendant cannot readily rely on family or friends for a 10 year total period to provide transportation due to those family members or friends having employment and schedules of their own.

(I.C.R. 35(b) Motion 2), is not any evidence, it is simply argument, and a baseless one at that. There is no affidavit of Johnson stating such, as such, there is no admissible evidence to support this argument of Johnson's counsel. Such argument, is nothing more than throw away language which tells this Court absolutely nothing. The language "direct and collateral negative impact" 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 Johnson'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 Johnson at this I.C.R. 35 juncture. Johnson has provided no admissible evidence, and most importantly, has provided no admissible **new** evidence.

The closest Johnson comes to explaining “new” evidence, is when counsel for Johnson forecasts what “might” be presented at a hearing. Johnson’s attorney writes:

Additional evidence will likely include testimony from the defendant and from his current probation explaining where defendant resides, where the probation office is located in relation to defendant’s residence, and transportation options in the area. Further evidence to likely include documentation related to defendant’s current employment and location of his employment in relation to his residence.

I.C.R. 35(b) Motion 3. What evidence will “likely” consist of does not cut it at this point.

Johnson has stated no new “evidence”, as all of these claims (and that is all the above is at this point...”claims” of Johnson’s attorney) are not new. All these “claims” were known at the time of the June 22, 2022, jurisdictional review hearing. In Johnson’s Addendum to the Presentence Report filed on June 7, 2023, which this Court stated it had read in preparation for Johnson’s June 22, 2023, jurisdictional review hearing, it is written that Johnson will be living at “322 N. Pine St. Pavillion, WY” and that he would be working for “Kilgore Construction LLC” located at “202 S. Pine St. Pavillion, WY” if he were to be granted probation. For counsel for Johnson to make the “claim” that “Further evidence to likely include documentation related to defendant’s current employment and location of his employment in relation to his residence” is disingenuous to say the least. A cursory look at Johnson’s residence address (202 S. Pine St.) and Johnson’s work (322 N. Pine St.) shows the two locations are **at most five blocks from each other**. Johnson

explained to this Court at his June 22, 2023, jurisdictional review hearing that Riverton, Wyoming, a much bigger town, was only about 30 minutes away from Pavillion, which only has about 400 people. June 22, 2023, Court Minutes 3:23:47. 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*, Johnson's

argument that the five-year license suspension will have “direct and collateral negative impact” on him (I.C.R. 35(b) Mot. 2) is not “new” evidence, and it is not “relevant” evidence as the argument itself is not related to any of the *Toohill* factors. Essentially, Johnson is arguing that the five-year license suspension will make probation too difficult. It was incumbent upon Johnson then, at this June 22, 2023, hearing, to refuse probation and have his prison sentences imposed.

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 Johnson’s I.C.R. 35(b) motion presents no new information, and no relevant information. Accordingly, under *Smith*, Johnson’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. Johnson’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. Johnson has presented this Court with no new evidence. That failure alone is reason for this Court to deny Johnson's I.C.R. 35(b) Motion without holding a hearing.

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

Given Johnson's prior felony criminal record which consists of multiple driving under the influence crimes and drug and alcohol crimes (2001 Assault; 2003 Driving Under the Influence, Possession of Marijuana and Drug Paraphernalia; 2015 Driving Under the Influence; 2018 Driving Under the Influence), and given the extremely high level of intoxication by Johnson in the felony Driving Under the Influence for which Johnson was sentenced on August 23, 2022, where he tested at a .216/.206 two and half times the legal limit, and the fact that **while Johnson was on felony supervised probation for that crime**, Johnson had the defiance, lack of control, stupidity and complete disregard of the law (since he lacked the legal ability to drive), as he committed his second felony Driving Under the Influence crime on October 7, 2022, the crime in the instant case CR28-22-17202, where he refused a breath test on two occasions (which he did not have the legal ability to do), and had to have blood drawn.

The Court exercises its discretion and decides Johnson'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 Johnson in support of his I.C.R. 35(b) Motion in CR28-22-17202.

Johnson's reasons for wanting a reduction in his period of driver's privileges is primarily due to the inconvenience the length of that suspension will cause him while on probation. That whining is unavailing. The Idaho Court of Appeals found a similar argument unavailing. In *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986), Anderson filed an I.C.R. 35(b) motion in which he did not argue the severity of the sentence when imposed, but rather argued prison presented a "lack of rehabilitation programs, overcrowding and violence and his severe pain and discomfort due to the lack of proper medical treatment in prison as reasons to reduce his sentence." 111 Idaho at 123, 721 P.2d at 223. In affirming the district court's denial of Anderson's I.C.R. 35(b) Motion, the Idaho Court of Appeals held:

The record shows that the district court considered the information. Even if we assume that the statements, concerning Anderson's health difficulties, good conduct and prison overcrowding and violence, contained in the motion are true, we cannot say that the district judge abused his discretion in determining that they were insufficient to overcome the original reasons for the sentence imposed. Those reasons included the nature of the crime, "a history of criminal activity," with convictions for "lots of prior felonies and prior offenses." When he sentenced Anderson, the district judge made it clear that he had little expectation Anderson would ever be rehabilitated. The judge was guided more by Anderson's "past conduct" than by "promises of future behavior." Although rehabilitation and health difficulties may be factors to weigh in considering a motion for reduction of sentence, they are not necessarily controlling. See *State v. Rundle*, 107 Idaho 936, 694 P.2d 400 (Ct.App.1984). Other factors include deterrence and protection of society. *State v. Toohill*, supra.

Having reviewed all the information available, we conclude that the district court did not abuse its discretion in failing to exercise leniency based upon information contained in the motion without conducting a hearing. Accordingly, the order denying the Rule 35 motion is affirmed.

*Id.*

This Court specifically finds that reducing Johnson's period of suspension of his driving privileges 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.* There is nothing about Johnson’s decisions over the past two years which would cause the Court to think for one second that a reduction in the amount of suspension of driving privileges would be consistent with this Court’s paramount duty to protect the public.

### III. ORDER.

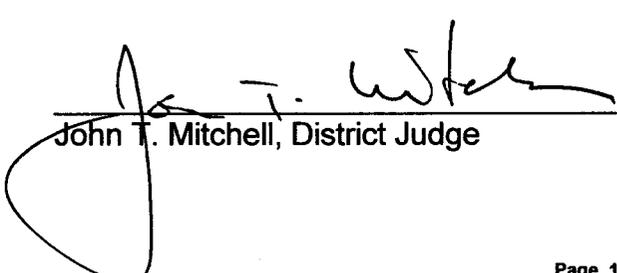
**IT IS HEREBY ORDERED** that defendant **MICHAEL BRUCE JOHNSON’s** I.C.R. 35(b) motion is **DENIED** for the reasons set forth above: This Court lacks jurisdiction to hear Johnson’s I.C.R. 35(b) Motion, and alternatively, Johnson has submitted no new evidence, and Johnson’s motion is devoid of any merit.

### NOTICE OF RIGHT TO APPEAL

**YOU, MICHAEL BRUCE JOHNSON, 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 8<sup>th</sup> day of August, 2023.

  
\_\_\_\_\_  
John T. Mitchell, District Judge

8<sup>th</sup>

**CERTIFICATE OF MAILING**

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

Prosecuting Attorney – Stan Mortensen *hepaicourt*

Defense Attorney – Jonathan Williams *pd.fax@idoc.gov*

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

MICHAEL BRUCE JOHNSON

IDOC # 144881

*central records idoc.idaho.gov*

CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY

BY: *Juanita Clavin*, Deputy