STATE OF IDAHO)
County of KOOTENAI) ss
FILED 8/8/2023
AT 1:40 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. **MEGAN JEAN MCKAY** DOB: xx/xx/1979 SSN: XXX-XX-1204 IDOC: 88172 Defendant.	Case No. CR28-22-10517 **MEMORANDUM DECISION AND ORDER DENYING I.C.R. 35 MOTION AND NOTICE OF RIGHT TO APPEAL**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On July 24, 2023, this Court sentenced Megan Jean McKay (McKay) to a fixed three year sentence followed by an indeterminate sentence of seven years, for a total unified sentence of ten years for the felony crime of Burglary, which McKay committed on June 17, 2022. Sentencing Disposition 1. This Court then committed McKay to the custody of the State of Idaho Board of Correction for up to one year pursuant to I.C. §19-2601, thus, retaining jurisdiction over McKay.

On August 4, 2023, McKay, through her attorney, Dana Bowes, timely filed a "Motion for Modification of Sentence Pursuant to I.C.R. 35(b)" (I.C.R. 35(b) Motion). In her I.C.R. 35(b) Motion, McKay, through counsel, requests this Court: "This Motion is a plea for leniency and is not based on the discovery of new information or evidence." I.C.R. 35(b) Motion 2. (underlining in original) McKay makes it clear "Defendant is requesting the Court place her on a supervised probation to allow her the opportunity of Mental Health Court in Spokane County." *Id.* at 1. Counsel for McKay seeks no other

relief in that motion and counsel for McKay does not request a hearing before the Court on her I.C.R. 35(b) Motion. *Id.*

This Court finds McKay's I.C.R. 35(b) motion must be denied without a hearing.

II. ANALYSIS.

A. McKAY'S I.C.R. 35 MOTION MUST BE DENIED BECAUSE McKAY 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.2nd 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, McKay 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 McKay could have presented in support of her Rule 35 Motion. Because McKay has completely failed to give any indication of any relevant facts which would support her claims, her Rule 35 Motion must be denied due to that failure alone. This is true even when counsel for McKay is quite up front about letting this Court know she in fact has no new evidence. McKay's desire to be placed on probation so that she could enter into Mental Health Court in Spokane County, Washington, was made clear to this Court at the July 24, 2023, sentencing hearing through her counsel (Court Minutes 3:04:26-3:08:41) and by McKay in her right of allocution. *Id.* at 3:12:14-3:18:11. The Court discussed that possibility in its decision. *Id.* at 3:38:41-3:43:34. The Court made it clear to McKay that the Court expected her to go to Mental Health Court in Spokane County following her period of retained jurisdiction. *Id.* at 3:42:30. The Court Minutes show this Court discussed with McKay its reasons for not placing her on probation at the July 24, 2023, hearing:

> I don't feel comfortable about probation for a lot of reasons. Not showing

> up for trial is a big one. There is reason to be hopeful for you. A Rider is what you need prior to going into the MHC program. Would like to be able to put you on probation, but wouldn't be the responsible decision. Trying to put you in a good position to be successfully moving forward in MHC program. Prior record is extreme for someone your age. Crimes you commit impact the public a lot. Disciplinary issues at jail aren't helping.

Id. at 3:38:41-3:42:30. Without presenting any new explanation as to why this Court was incorrect in any of those observations, without any new evidence, this Court has absolutely nothing upon which to base any I.C.R. 35(b) relief in reduction of McKay's sentence (or this Court's decision to utilize a retained jurisdiction).

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 *Cambpell* and *Huffman*, McKay's request

for probation is not based on any "new" evidence, and it is not a new request. Most importantly, the argument or request to be place on probation is not related to any of the *Toohill* factors. Essentially, McKay is simply arguing the Court to reconsider its retained jurisdiction decision, without any new eveidence or even new argument.

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

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

Given the concerning nature of McKay's Burglary crime, given her assessed risk of committing another crime (her LSI score was 38 which is high, Presentence Report 2), giver her prior felony criminal record which consists of multiple separate drug convictions in 2003, 2004, 2005, 2007, a second felony drug offense in 2007, 2009, 2016, 2017, as well as convictions for Grand Theft in 2007, Grand Theft in 2014, and a second Grand Theft in 2014, Possession of a Stolen Vehicle in 2015, and felony Assault with Bodily Harm in 2021, and given the fact that McKay failed to show up for her jury trial, probation would not have been a responsible decision for this Court to make. Nothing has been presented which would change this Court's assessment.

The Court exercises its discretion and decides McKay'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 McKay in support of her I.C.R. 35(b) Motion.

McKay's request to essentially reconsider its earlier decision without any new evidence or argument 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 placing McKay on a period of probation 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 McKay's decisions over the past year in which this action was pending which would cause the Court to think for one second that

she would stick around to be supervised and to be rehabilitated, even within a Mental Health Court program. Such decision to place McKay on probation at the present time would be anathema with this Court's paramount duty to protect the public.

III. ORDER.

IT IS HEREBY ORDERED that defendant **MEGAN JEAN MCKAY's** I.C.R. 35(b) motion is **DENIED** for the reasons set forth above: McKay has submitted no new evidence, and McKay's motion is devoid of any merit.

NOTICE OF RIGHT TO APPEAL

YOU, MEGAN JEAN MCKAY, 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 8th day of August, 2023.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of August, 2023 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

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CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____, Deputy