STATE OF IDAHO)
County of KOOTENAI) ss
FILED 8/8/2023
AT 5:00 O'clock P. M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff, vs. **TONEY AUGUST SCHOMER** DOB: xx/xx/1979 SSN: XXX-XX-1923 IDOC: 118490 Defendant.	Case No. **CRF 2015 13542** **MEMORANDUM DECISION AND ORDER DENYING I.C.R. 35 MOTION AND NOTICE OF RIGHT TO APPEAL**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On June 28, 2023, this Court revoked probation and imposed Toney August Schomer's (Schomer) prison sentence of fourteen years fixed and zero years indeterminate, but modified such to a fixed term of twelve years, followed by an indeterminate sentence of two years, for a total unified sentence of fourteen years for the felony crime of Grand Theft, which Schomer committed between April 1, 2015 and July 30, 2015. Probation Violation Disposition 1-2. This Court imposed that sentence and did not retained jurisdiction. *Id.* The Court noted, "THE PURPOSE OF THIS MODIFICATION IS SOLELY TO GIVE SCHOMER AN INCENTIVE TO BEHAVE WHILE SERVING THE FIXED PORTION OF HIS SENTENCE, AND TO GIVE THE PAROLE COMMISSION TWO YEARS TO SUPERVISE SCHOMER SHOULD HE MAKE PAROLE." *Id.* at 2

On July 12, 2023, Schomer, through his attorney, Jonathan Williams, timely filed a "Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in

Support" (I.C.R. 35(b) Motion). In his I.C.R. 35(b) Motion, Schomer, through counsel, requests this Court, as a "plea for leniency" (I.C.R. 35(b) Motion 1) that this Court "modify Toney August Schomer's sentence to a fixed period of 6 years, to be followed by an indeterminate period of 6 years for a total of 12 years." *Id.* at 2. Counsel for Schomer adds the apparent obligatory language of the Office of the Kootenai County Public Defender: "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 Schomer claims, "Additional evidence will likely include testimony from the defendant regarding his mental health and openness to rehabilitation, and potentially documentation in support of defendant's request." *Id* at 3. Counsel for Schomer requested a hearing before the Court on his I.C.R. 35(b) Motion. *Id.* A hearing date of August 29, 2023, at 9:00 a.m. was given by this Court.

This Court finds Schomer's I.C.R. 35(b) motion must be denied without a hearing for the following reasons.

II. ANALYSIS.

A. SCHOMER'S I.C.R. 35 MOTION MUST BE DENIED BECAUSE SCHOMER 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, Schomer 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 Schomer could have presented at a hearing in support of his Rule 35 Motion. Because Schomer 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. Schomer's desire to have the fixed portion of his sentence reduced even further by this Court is not supported by any relevant, admissible, new evidence.

Without presenting any new explanation as to why this Court was incorrect in any way for *sua sponte* reducing the fixed portion of Schomer's sentence by two years at the June 28, 2023, hearing, without any new evidence, this Court has absolutely nothing upon which to base any I.C.R. 35(b) relief in further reduction of Schomer's fixed or indeterminate portions of his sentence.

Several 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). 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.
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> 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*, Schomer's request for further reduction in the fixed portion of his sentence probation is not based on

any "new" evidence. Most importantly, the argument or request to be place on probation is not related to any of the *Toohill* factors. Essentially, Schomer is simply arguing the Court to reconsider its decision, without any new evidence 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 Schomer's I.C.R. 35(b) motion presents no new information, and no new relevant information. Accordingly, under *Smith*, Schomer'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. Schomer'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. Schomer has presented this Court with no new evidence. That failure alone is reason for this Court to deny Schomer's I.C.R. 35(b) Motion without holding a hearing.

As set forth above, Schomer'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, especially the Kootenai County Public Defender's Office. 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 Schomer'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 yet 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 Schomer at this I.C.R. 35 juncture. Schomer has provided no new evidence.

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

Given the disturbing facts of Schomer's felony Grand Theft crime (stealing a shed) possession of methamphetamine, given the fact that over the eight-year course of this case Schomer has had numerous probation violations, given the fact that Schomer was given the opportunity of Drug Court and more recently being given the rehabilitational opportunity of a lifetime to participate in Mental Health Court, given Schomer's lengthy and concerning criminal history Schomer (1985 felony Robbery as a juvenile; a 1988 Robbery as a juvenile; a 1989 Felony Possession of Stolen Property as an adult; a 1990 felony Forgery; a 1991 felony Robbery for which Schomer served 53 months in prison in Washington; a 1994 Assualt; a 2002 Federal Felon in Possession of a Firearm conviction for which Schomer swas sentenced 37 months in prison; and a 2015 driving without privileges) and given Schomer's numerous probation violations (both federal and state) before committing the felony Grand Theft in this case in 2015 (Presentence Report 5-11), further reduction in Schomer's fixed portion of his sentence is not warranted. Nothing has been presented by Schomer to persuade this Court to further reduce his sentence.

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

Schomer'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.
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> 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 further reducing Schomer's fixed portion of his sentence 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 Schomer's decisions over the past eight years in which this Court has observed Schomer which would cause the Court to think for one second that a further reduction would be warranted. Such decision to further reduce Schomer's sentence would be anathema with this Court's paramount duty to protect the public.

III. ORDER.

IT IS HEREBY ORDERED that defendant **TONEY AUGUST SCHOMER's** I.C.R. 35(b) motion is **DENIED** for the reasons set forth above: Schomer has submitted no new evidence, Schomer's motion is devoid of any merit and it is frivolous.

IT IS FURTHER ORDERED the hearing set for August 29, 2023, is **VACATED.**

NOTICE OF RIGHT TO APPEAL

YOU, TONEY AUGUST SCHOMER, 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 10th day of August, 2023 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Prosecuting Attorney – Stan Mortensen rcpaicourts.
Defense Attorney – Jonathan Williams pd-faxe Kcgov.us

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

TONEY AUGUST SCHOMER
IDOC # 118490
centralrecords@idoc.idaho.gov.

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: ______ Deputy