

counsel Jonathan Williams stated that the original sentence was four years fixed and six years indeterminate and that credit for time served was 815 days. April 4, 2023, Court Minutes at 3:52:06 p.m. When this Court announced its decision, it noted that Michael's credit for time served was actually 847 days. *Id.* at 3:59:28. The Court then gave Michael a choice, either do the retained jurisdiction or the Court would impose his prison sentence. *Id.* at 3:59:42. Michael unequivocally wanted his sentence imposed. *Id.* at 4:00:01. The Court did exactly as Michael requested; the Court imposed Michael's prison sentence. *Id.* at 4:00:20.

On July 10, 2023, Michael, through his court-appointed counsel, Jonathan Williams, filed a Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support (I.C.R. 35(b) Motion). Counsel for Michael claims "This motion is made as a plea for leniency." I.C.R. 35(b) Mot. 1. Counsel for Michael 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.* at 2. Such throw away sentence tells this Court absolutely nothing. In that I.C.R. 35(b) Motion, Michael incredulously argues: "Additional evidence will likely include testimony from the defendant regarding not understanding at the time of disposition the full amount of remaining time on his sentence and his desire to complete treatment at Brick House Recovery and possible other individuals, and potentially documentation in support of the defendant's request." *Id.* at 3.

Finally, in his I.C.R. 35(b) Motion, Michael requests a hearing. *Id.* That request for a hearing (on his I.C.R. 35 Motion) must be denied for the reasons set forth below.

Additionally, Michael's I.C.R. 35 Motion itself must be denied, without a hearing, for the reasons set forth below.

II. MICHAEL'S I.C.R. 35 MOTION MUST BE DENIED BECAUSE MICHAEL HAS STATED NO NEW EVIDENCE IN HIS I.C.R. 35 MOTION.

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, Michael 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 Michael could have presented in support of his Rule 35 Motion. Because Michael 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, Michael’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. 1) is not any evidence, it is simply argument, a baseless one at that. As mentioned above, such is 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 June 26, 2023, in *State v. Alyssa Duncan*, Kootenai County Case No. CR28-23-3250:

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.

In his I.C.R. 35(b) Motion, Michael next incredulously argues: "Additional evidence will likely include testimony from the defendant regarding not understanding at the time of disposition the full amount of remaining time on his sentence and his desire to complete treatment at Brick House Recovery and possible other individuals, and potentially documentation in support of the defendant's request." *Id.* at 3. First of all, that statement that defendant would testify at a hearing on his I.C.R. 35(b) motion, that he lacked "understanding at the time of disposition the full amount of remaining time on his sentence", is patently false. Surely, Michael's counsel would not call Michael as a witness to intentionally lie? The claim that Michael "lacked understanding at the time of disposition the full amount of the remaining time on his sentence" is patently false because at Michael's April 4, 2023, probation violation disposition hearing, just before Michael asked this Court to impose his prison sentence, Michael's counsel had just finished reiterating exactly what Michael's sentence was (the same sentence which had been in place for almost eight years at that point), and Michael's counsel had just stated (in an erroneous understatement) what Michael's credit for time served was as of the April 4, 2023, hearing.

Second, even if it were true (it is not, at least that part about Michael no knowing what his sentence was), the claimed abject ignorance of Michael is not evidence of anything relevant on an I.C.R. 35(b) Motion. In that purported statement (that he didn't know his sentence and didn't know how much time was left to serve) there is no *new* relevant evidence. It is not *new* evidence because it is exactly what was discussed by Michael's counsel at Michael's April 4, 2023, disposition hearing, just before Michael

made the choice to have this Court impose his prison sentence. As far as his proposal to go through Brickhouse Recovery, that is not *new* evidence. Michael's attorney discussed Brickhouse Recovery at the April 4, 2023, hearing. April 4, 2023, Court Minutes at 3:46:43 p.m. At that time, Michael had merely wanted to apply to Brickhouse Recovery, he had not been accepted into that facility. And even if Michael had been accepted into Brickhouse Recovery on April 4, 2023, (he wasn't), how invested in his own recovery is Michael when just a couple of weeks before he is using a whizzinator before his probation officer to avoid detection of using controlled substances? There is no evidence as of the time of Michael's I.C.R. 35(b) Motion, that he has an actual bed date at Brickhouse Recovery.

Finally, the statement that "possible other individuals" might testify, is not evidence. There is no indication in the I.C.R. 35(b) Motion about what testimony Michael or any other witness might provide at any hearing on Michael'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.

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." Michael has stated no new "evidence", he has only stated his desire to be placed on probation. Not only is there no "evidence" provided by Michael, he has not set forth even a cogent "reason" why he should be placed on probation, 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 *Cambpell* and *Huffman*, Michael'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 the relief Michael seeks, which is to be placed back on probation.

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. This Court specifically finds that Michael's I.C.R. 35(b) motion presents no new information, and no relevant information. Accordingly, under *Smith*, Michael'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. Michael'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. Michael has presented this Court with no new evidence. That failure alone is reason for this Court to deny Michael's I.C.R. 35(b) Motion

without holding a hearing.

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

Michael was found guilty by a jury on April 20, 2015. On June 29, 2015, this Court sentenced Michael to four years fixed and six years indeterminate and retained jurisdiction. Sentence Disposition 1-2. Following the retained jurisdiction, Michael was placed on probation on March 2, 2016. A little more than a year later, on May 5, 2017, Michael's probation officer issued an Agent's Warrant and Michael was taken into custody for avoiding supervision, and for testing positive for controlled substances. May 11, 2017, Report of Violation 1-2, ¶¶ 1, 3. Michael eventually admitted to these allegations at his evidentiary hearing, and on July 11, 2017, this Court sent Michael on another period of retained jurisdiction. Probation Violation Disposition 1-2. On March 6, 2018, this Court again placed Michael on probation. Retained Jurisdiction Disposition 1-2. Seven months later, an Agent's Warrant was again utilized by Michael's probation officer, this time for committing new felony charges. On January 23, 2019, this Court again sent Michael on a period of retained jurisdiction. Probation Violation Disposition 1-2. On August 28, 2019, this Court again placed Michael on probation, this time until March 2, 2026. Retained Jurisdiction Disposition 1-2. On March 8, 2023, Michael was taken into custody under this Court's Bench Warrant, and on April 4, 2023, Michael admitted violating probation as alleged in the March 9, 2023, Report of Violation. Those allegations included methamphetamine use on October 28, 2022, January 31, 2023, February 13, 2023, and March 3, 2023, and the following:

On 03/03/23, Mr. Michael reported to Probation and Parole for a scheduled office appointment. Mr. Michael failed to report for a substance test at Absolute Drug Testing on 02/21/23, and was issued a substance test in office. During the substance test, Mr. Michael attempted to use a device (Whizzinator), to alter the results of his test. Mr. Michael was issued another substance test and subsequently tested for positive for methamphetamine. (Refer to Attached Photo

of Device and Written Admission Dated 03/03/23).

Report of Violation 2. Substituting someone else's urine to pass a drug test with your probation officer is the epitome of criminal thinking. In the eight years of trying to rehabilitate Michael, he only got worse in his criminal thinking. Michael has demonstrated his firm commitment to not following this Court's orders. There is no possible way for this Court to protect the public with Michael in the public. There is no earthly reason to believe that somehow Michael will now, miraculously, perform well on supervised probation. He just submitted someone else's urine to his probation officer. There is no reason for this Court to place Michael on probation. This Court specifically finds that given the severity of Michael's past crimes, and his abysmal record on supervised probation, the idea of placing Michael back on 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).

IV. MICHAEL IS NOT ENTITLED TO A HEARING ON HIS I.C.R. 35 MOTION.

As mentioned above, "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). Because Michael has set forth no reason, and no new evidence, to support his request for cutting his sentence in half, this Court exercises its discretion and finds that a hearing is not necessary and could only be a waste of time. Accordingly, Michael's I.C.R. 35(b) Motion in this case is denied without a hearing.

V. ORDER.

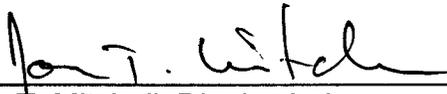
IT IS HEREBY ORDERED that defendant Mitch Curtis Michael Jr.'s I.C.R. 35(b) motion is **DENIED** for the reasons set forth above: Michael has submitted no new evidence, and Michael's motion is devoid of any merit.

NOTICE OF RIGHT TO APPEAL

YOU, MITCH CURTIS MICHAEL, JR., 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 (if any).

DATED this 11th day of July, 2023.

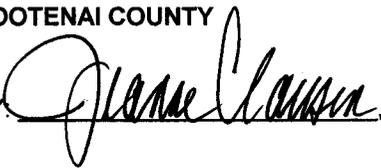


John T. Mitchell, District Judge

I hereby certify that on the 11th day of July, 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