STATE OF IDAHO)
County of KOOTENAI) ss
FILED 6/12/2023
AT 11:20 O'clock A 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.

BRANDON LOUIS RICE
DOB: 10/27/1994
SSN: XXX-XX-4158
IDOC: 143567

Defendant.

Case No. **CR28-21-13988**

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

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On March 9, 2022, defendant Brandon Louis Rice (Rice) pled guilty to two counts of felony Injury to Child and one count of misdemeanor sexual battery. Am. Information 1-2. This occurred following a mediation between the parties which resulted in an agreement. The agreement required, "Defendant agrees to PSE/full disclosure polygraph (asking about other sexual contact w/minors), and agrees to be supervised as a sex offender if ever placed on probation/parole." Pretrial Settlement Offer 1. Count I occurred on October 22, 2016, and concerned the victim G.L.B, and Count II occurred on or between January 1, 2016 and June 1, 2016, and concerned the victim N.V. *Id.* Count I alleged Rice was "engaging in manual-genital contact with G.L.B., a child 9 years of age, by asking her if she wanted to see his penis and then forcing her to touch his penis." *Id.* at 2. Count II alleged Rice was "asking N.V., a child between the years of 7-8 years of age, if she had ever seen a penis and then masturbated in front of her." *Id.* Count III stated Rice "did willfully have physical contact with the intimate parts of G.L.B and/or N.V.

without their consent, and with the intent to arouse, appeal to or gratify the lust, passion or sexual desires of the (Rice)." Rice pled guilty to all three counts via *North Carolina v. Alford*. District Judge Lansing Haynes set sentencing for May 27, 2022, and ordered a Presentence Report and a Sex Offender Evaluation. Order for Presentence Investigation (PSI) Report 1. The May 27, 2022, sentencing hearing was continued by Senior District Judge Scott Wayman (Judge Haynes had now retired), based on the stipulation of the parties on the basis that the psychosexual evaluation had not yet been completed. Sentencing was scheduled for August 1, 2022. On July 20, 2022, sentencing was again continued, and rescheduled for September 1, 2022. The reason for that continuance is not clear. On August 31, 2022, the psychosexual evaluation of Robert K. Wyatt, MSW, LCSW was filed with the Court. Contrary to the Pretrial Settlement Offer, no full disclosure polygraph asking about other sexual contact with minors was prepared for sentencing. Nonetheless, sentencing proceeded. At sentencing on September 1, 2022, Judge Wayman imposed a five year fixed followed by a five year indeterminate sentence for a total unified sentence of ten years on each of the two felony counts of Injury to Child, and ran those sentences concurrently. Judgment and Sentence 2. Judge Wayman sentenced Rice to the custody of the State of Idaho Department of Correction, but retained jurisdiction for up to one year pursuant to I.C. § 19-2601. *Id.* As to Count III, Judge Wayman imposed 180 days of jail time. Judgment 1.

At no point in time has any judge or Rice's attorney calculated credit for time served in this matter. On January 4, 2023, the undersigned was assigned to Rice's case. The undersigned has made that calculation for credit for time served. As of the date of this decision, June 12, 2023, Rice had served 284 days (from September 1, 2022 to June 12, 2023) credit for time served.

On June 1, 2023, the undersigned presided over Rice's jurisdictional review

hearing. Rice attended via Zoom and was represented by his attorney, Jed Nixon. The plaintiff was represented by Corey Weber. The Addendum to the Presentence Report (APSI) filed on May 30, 2023, the report from Idaho Department of Corrections Program Manager, Cameron Kirk, recommended probation. Both attorneys requested probation. The Court noted that as of that June 1, 2023, jurisdictional review hearing, which occurred over fourteen months after the Pretrial Settlement Offer was signed by Rice, a full disclosure polygraph asking about the sexual contact with minors, still had not been produced. At the conclusion of that jurisdictional review hearing, this Court imposed Rice's two concurrent felony prison sentences. By this time, the sentence on the misdemeanor in Count III had already been served.

After the September 1, 2022, sentencing hearing and decision by Judge Wayman, Rice's attorney Jed Nixon, on December 30, 2022, timely (at least under the fourteen-day limitation following a sentencing hearing pursuant to I.C.R. 35(b)) filed a "Motion for Modification of Sentence Pursuant to I.C.R. 35(b)" on behalf of his client, Rice. In that I.C.R. 35 Motion, counsel for Rice moves this Court, "respectfully requesting this Court reconsider giving him credit for time served, suspending his sentence, and placing him on a period of probation to allow him to complete community-based treatment." Mot. for Modification of Sentence Pursuant to I.C.R. 35(b), 2. Counsel for Rice stated, "Additional evidence may include testimony from the defendant and additional witnesses." *Id.* However, there is no indication in the I.C.R. 35 Motion about which Rice or other witnesses would be testifying. Counsel for Rice writes:

> 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. The defendant has been sexually assaulted while incarcerated, a CPS referral has been made by his children's daycare due based upon their current living environment, and his fiancé had to relocate to California and is suffering from severe depression since the birth of their child. The defendant has no prior experience in the felony court system and has the

> community relations and family support necessary to successfully complete community-based treatment while on supervised probation.

Id. This Court notes that none of this is evidence. Counsel for Rice requested a hearing in his I.C.R. 35 Motion (*Id.* at 2-3), but never obtained a hearing date and never noticed up such a hearing with this Court or any other District Judge previously assigned to this case. As of the date of this Memorandum Decision and Order, it has been 165 days since counsel for Rice filed his I.C.R. 35 Motion, and that is still the status; that is, no hearing has been requested of this Court's clerk, and no hearing has been noticed up by counsel for Rice.

At the time the undersigned was preparing for the jurisdictional review hearing, this Court noticed that Rice had filed an I.C.R. 35 Motion. This Court finds that Rice's I.C.R. 35 Motion must be denied without a hearing based on the following.

II. ANALYSIS.

A. THIS COURT LACKS JURISDICTION TO HEAR RICE'S I.C.R. 35 MOTION DUE TO IT NOT BEING DECIDED IN THE PAST 165 DAYS.

First and foremost, while Rice's I.C.R. 35 Motion is timely filed, this Court can no longer address Rice's motion. Rice and his attorney have waited too long to bring this matter to any judge's attention. As such, this Court has lost jurisdiction to hear Rice's I.C.R. 35 Motion. To hear such motion at this time would invade the province of the State of Idaho Commission of Pardons and Parole. The Idaho Court of Appeals in *State v. Maggard*, 126 Idaho 477, 886 P.2d 782 (Ct. App. 1994), held:

> At the outset, we are faced with the State's assertion that the district court lacked jurisdiction to decide Maggard's motion. The State's argument is based upon our Supreme Court's decision in *State v. Chapman,* 121 Idaho 351, 825 P.2d 74 (1992). In *Chapman,* the defendant had filed a motion for probation or for reduction of his sentence pursuant to I.C.R. 35. Twenty-nine months later, the district court entered an order denying the motion. Chapman then filed a motion for reconsideration, which the district court granted, ordering Chapman

released on probation. This order occurred thirty-two months after the Rule 35 motion was filed. The State appealed from the order releasing Chapman on probation. The issue on appeal, as framed by the Supreme Court, was "Did the district court have jurisdiction to grant Chapman's motion?" 121 Idaho at 352, 825 P.2d at 75. The Court answered this inquiry in the negative, reversed the order granting probation to Chapman and directed reinstatement of the order denying probation to Chapman.

The Court reached its conclusion in *Chapman* on the ground that the period of time-thirty-two months-which expired before the district court granted Chapman's motion, was an unreasonable delay. The Court noted that "any delay which allows the trial court to infringe upon the duties of the parole board is per se unreasonable." *Chapman,* 121 Idaho at 355, 825 P.2d at 78. The Court further recognized, however, that a trial court should be allowed some period of time to decide a Rule 35 motion, beyond the 120-day period within which such a motion may be timely filed.

> As [*United States v. Stollings,* 516 F.2d 1287 (4th Cir.1975)] made clear, a strict interpretation may often prejudice a defendant who filed a timely motion but was denied a ruling because the trial court was unable to act upon the motion within the 120-day period for reasons outside the defendant's control, such as illness or other case matters. In these situations, in which the district court delayed ruling on the motion not in order to evaluate the defendant's progress in prison, but simply because the court had not had time to consider it, it would be entirely unfair to the defendant to not allow the trial court a "reasonable" time after the 120-day period had expired to rule on the motion.

Chapman, 121 Idaho at 354, 825 P.2d at 77. The Court then held that the trial court overstepped its jurisdictional boundaries by granting Chapman's probation at the late date, thirty-two months after Chapman had filed his Rule 35 motion. Accordingly, while valid reasons may exist to delay the decision on a Rule 35 motion in a particular case, the delay may not be for the purpose or with the likely effect of assuming the function of the parole authorities. If the purpose or effect of the delay is to infringe upon the constitutional duties of the parole commission, the delay is per se unreasonable and the court loses jurisdiction to grant relief under Rule 35.

Here, the record is silent with regard to the reasons for the district court's determination to take the motion under advisement and to delay a decision on the motion for a period of six months. There is no indication in the record that Maggard requested additional time to supplement the record or that he intended to submit any additional evidence after the motion was filed. Neither the state nor Maggard requested that the motion be held in abeyance, nor is there any indication that the delay was necessitated by the court's schedule. If the reason was to obtain more information about Maggard's circumstance or performance while in the custody of the Board of Correction, surely that information could have been gained in less than a six-month period. As it turned out, no new or additional information was ever submitted to support Maggard's motion.

> Consequently, the court had before it all information relevant to the motion on the day the motion was made. A decision on this motion should have been made thereafter within a reasonable period of time. Because there is nothing in the record to show the extent of the period otherwise necessary to decide the motion, we must conclude that the eight-month delay was unreasonable under the principles expressed in *Chapman* forbidding an infringement on the executive authority held by the Commission of Pardons and Parole. *See Brandt v. State,* 118 Idaho 350, 796 P.2d 1023 (1990).
>
> The order denying relief under I.C.R. 35 is affirmed on the ground that the district court lost jurisdiction to grant the motion.

126 Idaho at 479-80, 886 P.2d at 784-85. (underlining added). *Maggard* makes clear that there need not be any nefarious reason by the defendant for the delay. Rather, it is the "effect" of the delay that is important; if the delay has the "likely effect of assuming the function of the parole authorities", the district court has lost jurisdiction. 126 Idaho at 479, 886 P.2d at 784. "If the purpose or effect of the delay is to infringe upon the constitutional duties of the parole commission, the delay is per se unreasonable and the court loses jurisdiction to grant relief under Rule 35." *Id.* (underlining added). At the time Rice filed his I.C.R. 35 Motion, he was only 91 days into completing the five-year fixed portion of his sentence. The indeterminate portion of Rice's sentence is the purview of the State of Idaho Commission of Pardons and Parole. In his I.C.R. 35 Motion, Rice is asking for the relief of probation, not a reduction in his sentence. However, if Rice were to now ask for a reduction in either the fixed portion of his sentence, or the indeterminate portion of his sentence; the former would hasten the day to Commission of Pardons and Parole would have purview over Rice's sentences (*see State v. Tranmer*, below), and that latter is clearly exclusively their purview. Since Rice is asking for probation as his requested relief, *Maggard*, makes clear that while any delay which results in an invasion of the Commission of Pardons and Parole is *per se* unreasonable, there can be other reasons for finding the delay is unreasonable.

Turning to the underlined portion of *Maggard* quoted above, the same can be said for the facts in Rice's case:

> There is no indication in the record that Maggard [Rice] requested additional time to supplement the record or that he intended to submit any additional evidence after the motion was filed. Neither the state nor Maggard [Rice] requested that the motion be held in abeyance, nor is there any indication that the delay was necessitated by the court's schedule

126 Idaho at 479, 886 P.2d at 784. In the past 165 days, Rice has not requested additional time to supplement the record in aid of his I.C.R. 35 Motion. In the past 165 days, Rice has not indicated that he intended to submit any additional evidence in support of his I.C.R. 35 Motion. In the past 165 days, neither Rice nor the plaintiff have requested that Rice's I.C.R. 35 Motion be held in abeyance. There is no indication that the 165-day delay was necessitated by the court's schedule.

Seven years after *Maggard*, the Idaho Court of Appeals decided *State v. Tranmer*, 135 Idaho 614, 21 P.3d 936 (Ct. App. 2001). This Court notes that the pertinent period of time in *Tranmer* was the number of days between sentencing and having the I.C.R. 35(b) motion decided. In Rice's case, it has been 284 days since he was sentenced by Judge Wayman, and, until now, his I.C.R. 35(b) motion has yet to be decided. The Idaho Court of Appeals in *Tranmer* held:

> On appeal, the state argues that the district court lost jurisdiction to reduce Tranmer's sentence because it delayed its decision for a period of eleven months. In pertinent part, Rule 35 provides that the trial court "may reduce a sentence within 120 days after the filing of a judgment of conviction or within 120 days after the court releases retained jurisdiction." However, it is well settled in Idaho that a trial court does not lose jurisdiction to act upon a timely filed motion under Rule 35 merely because the 120–day period expires before the judge can reasonably consider and act upon the motion. *See State v. Chapman,* 121 Idaho 351, 353, 825 P.2d 74, 76 (1992); *State v. Simpson,* 131 Idaho 196, 197, 953 P.2d 636, 637 (Ct.App.1998). A trial court will retain jurisdiction to rule upon a Rule 35 motion if it acts within a "reasonable time" after the 120 day limitation expires. *Chapman,* 121 Idaho at 353, 825 P.2d at

76; *see also Simpson,* 131 Idaho at 197, 953 P.2d at 637. The Idaho Supreme Court explained:

> [A] strict interpretation [of Rule 35] may often prejudice a defendant who filed a timely motion but was denied a ruling because the trial court was unable to act upon the motion within the 120–day period for reasons outside the defendant's control, such as illness or other case matters. In these situations, in which the district court delayed ruling on the motion *not in order to evaluate the defendant's progress in prison,* but simply because the court had not had time to consider it, it would be entirely unfair to the defendant to not allow the trial court a "reasonable" time after the 120–day period has expired to rule on the motion.

Chapman, 121 Idaho at 354, 825 P.2d at 77 (emphasis added).

The reasonableness of any delay by the district court in ruling upon a Rule 35 motion must be evaluated in light of the purposes supporting the 120–day limitation and the reasons for the trial court's delay in each case. *United States v. Smith,* 650 F.2d 206, 209 (9th Cir.1981). The 120–day limitation serves two purposes: it protects judges from repeated pleas by those sentenced and it ensures "that the court does not usurp the responsibilities of the parole officials by acting on the motion *in light of the movant's conduct while in prison.*" *Simpson,* 131 Idaho at 197–98, 953 P.2d at 637–38 (emphasis added); *see also Chapman,* 121 Idaho at 353, 825 P.2d at 76. The second of these purposes insures that the district court's power to reduce a sentence will not be misused as a substitute for the consideration for parole by the Commission of Pardons and Parole by holding a timely motion for reduction of sentence in abeyance for months or years and then seeking to grant it on the basis of defendant's conduct in prison. *United States v. Taylor,* 768 F.2d 114, 117 (6th Cir.1985); *United States v. Krohn,* 700 F.2d 1033, 1037 (5th Cir.1983). The "reasonable time" granted to the trial court is "a reasonable time to decide the issue presented by the rule 35 motion, *not a license to wait and reevaluate the sentencing decision in the light of subsequent developments.*" *Diggs v. United States,* 740 F.2d 239, 246–47 (3d Cir.1984) (emphasis added); *see also Chapman,* 121 Idaho at 354, 825 P.2d at 77. Any delay "which allows the trial court to infringe upon the duties of the parole board is per se unreasonable." *Chapman,* 121 Idaho at 355, 825 P.2d at 78. Therefore, we conclude that Rule 35 is also not a substitute for the trial court's failure to utilize this state's retained jurisdiction program at the time a defendant's sentence is originally imposed.

The "reasonable time" rule was first adopted by the Idaho Supreme Court in *Chapman.* In that case, the district court ordered preparation of an inmate's progress report at the request of the defendant's counsel approximately one and one-half years after the defendant filed a Rule 35 motion. Initially, the district court denied the defendant's motion. In response to a motion to reconsider, the district court granted the defendant's motion after reevaluating the progress report and concluding that the defendant was a model prisoner and likely to become a

productive member of society. The Idaho Supreme Court held that the decision by the district court was an invasion of the executive authority held by the Commission of Pardons and Parole. *Chapman,* 121 Idaho at 355, 825 P.2d at 78.

The Idaho Supreme Court and this Court have considered a number of cases in which the district court delayed its decision regarding a Rule 35 motion beyond the 120 day limitation. In many of these cases, it was held that the delay was unreasonable because the record was silent as to the basis for the delay. *See State v. Payan,* 132 Idaho 614, 619, 977 P.2d 228, 233 (Ct.App.1998); *Simpson,* 131 Idaho at 198, 953 P.2d at 638; *State v. Day,* 131 Idaho 184, 186, 953 P.2d 624, 626 (Ct.App.1998); *State v. Maggard,* 126 Idaho 477, 479, 886 P.2d 782, 784 (Ct.App.1994). In *State v. Book,* 127 Idaho 352, 900 P.2d 1363 (1995), the Idaho Supreme Court held that the district court reasonably delayed its decision while waiting for the defendant to gather additional information in support of his Rule 35 motion, noting that the information eventually gathered was not new evidence. In *State v. Matteson,* 123 Idaho 622, 851 P.2d 336 (1993), the Idaho Supreme Court affirmed the district court's refusal to delay its decision for more than eight months in order to wait for the preparation of a psychiatric evaluation report. In *State v. Nickerson,* 123 Idaho 971, 855 P.2d 56 (Ct.App.1993), this Court held that the district court reasonably delayed its decision while waiting for the underlying sentence to be appealed. This Court explained in *Nickerson* that the authority of the parole officials was not infringed upon by the district court's delay because the Board of Correction did not have custody of the defendant as the district court had stayed the execution of the underlying sentence pending the appeal. *Id.* at 974, 855 P.2d at 59.

In the instant case, the district court did not utilize this state's retained jurisdiction program. Rather, upon reviewing Tranmer's Rule 35 motion, the district court delayed its consideration of the motion for a period of eleven months for the *sole* purpose of considering Tranmer's conduct while incarcerated. In thereafter granting Tranmer's motion, the district court essentially reduced the fixed portion of his sentence to time served. However, in doing so, the district court infringed upon the executive duties granted to the Commission of Pardons and Parole. As a result, we hold that the district court lost jurisdiction to act upon Tranmer's Rule 35 motion.

We recognize that in *State v. Brydon,* 121 Idaho 890, 828 P.2d 919 (Ct.App.1992), this Court concluded that a district court reasonably delayed its decision regarding a Rule 35 motion for a period of five months while waiting to receive additional progress reports from the Idaho Department of Correction, partially on the grounds that the defendant was not yet eligible for parole. This Court then affirmed the district court's denial of Brydon's Rule 35 motion. After further consideration of the standard adopted by the Idaho Supreme Court in *Chapman,* however, we are unpersuaded that a defendant's parole eligibility date is determinative when considering whether a trial court reasonably delayed its decision in regard to a Rule 35 motion.

> As stated in *Chapman,* any delay "which allows the trial court to infringe upon the duties of the parole board is per se unreasonable." *Chapman,* 121 Idaho at 355, 825 P.2d at 78. A clear indication of infringement occurs when a district court reduces a sentence while the defendant is serving the indeterminate portion of his sentence. *See Chapman,* 121 Idaho at 355, 825 P.2d at 78. However, it is not the only indication that a district court has infringed upon the duties of the parole board. *See Simpson,* 131 Idaho at 198, 953 P.2d at 638 (holding delay unreasonable although defendant was not eligible for parole). A district court's delay also infringes upon the duties of the parole board by holding a timely motion for reduction of sentence in abeyance for months or years and then seeking to grant it on the basis of defendant's conduct in prison. *Taylor,* 768 F.2d at 117; *Krohn,* 700 F.2d at 1037. Such conduct was committed by the district court in *Chapman* and held to have caused the district court to overstep its jurisdictional boundaries. *Chapman,* 121 Idaho at 355, 825 P.2d at 78. Insofar as the language in *Brydon* can be read to condone a trial court's purposeful delay in ruling on a Rule 35 motion simply in order to consider a defendant's subsequent conduct while incarcerated, it is overruled.
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> Based upon the foregoing discussion, we hold that the district court lost jurisdiction to act upon Tranmer's Rule 35 motion by unreasonably delaying its decision for the sole purpose of considering Tranmer's conduct while in prison. Therefore, the district court's order granting Tranmer's Rule 35 motion is reversed.

135 Idaho at 615-18, 21 P.3d at 937-940 (footnotes omitted) (italics in original).

Based on *Tranmer*, it could be argued by Rice that the delay in this case is due to Judge Haynes' retirement, and no judge previous to the undersigned has decided Rice's I.C.R. 35 Motion. That claim is put to rest by the following case. This Court finds that in deciding Rice's I.C.R. 35 Motion, the most on-point case is *State v. Simpson*, 131 Idaho 196, 953 P.2d 636 (Ct. App. 1998), in which the Idaho Court of Appeals held:

> Darrell K. Simpson pled guilty to two counts of forgery, I.C. §§ 18-3601, -3604. On June 12, 1995, the court imposed concurrent unified twelve-year sentences, with two years fixed and credit for eighty-one days served. Simpson filed a timely notice of appeal from the judgment of conviction. Simpson also filed *pro se* motions for appointment of counsel and for reduction of his sentence pursuant to Idaho Criminal Rule 35 on August 29, 1995. A pro tem district judge appointed the public defender to represent Simpson, and on January 6, 1997, a new district judge denied Simpson's Rule 35 motion after a hearing. Simpson again appealed, asserting that the district court's denial of his Rule 35 motion was an abuse of discretion.

At the outset, we address the state's claim that the district court lost jurisdiction when it waited over fifteen months before issuing a decision on Simpson's motion. Rule 35 provides that "[t]he court may reduce a sentence within 120 days after the filing of a judgment of conviction or within 120 days after the court releases retained jurisdiction...." Under certain circumstances, both this Court and the Idaho Supreme Court have declined to strictly construe the 120-day limitation, holding that a trial court must rule upon a Rule 35 motion within a *reasonable* time after the 120-day period expires. *See State v. Chapman,* 121 Idaho 351, 354, 825 P.2d 74, 77 (1992); *State v. Maggard,* 126 Idaho 477, 479-80, 886 P.2d 782, 785-86 (Ct.App.1994). Delays ranging from five months to one year after the expiration of the 120-day period have been deemed reasonable, while delays ranging from eight months to two years have been deemed unreasonable. *See Chapman,* 121 Idaho at 354-55, 825 P.2d at 77-78 (two-year delay in issuing a decision on a Rule 35 motion is unreasonable); *State v. Day,* 131 Idaho 184, 953 P.2d 624 (App.1998) (nine-month delay awaiting resolution of direct sentence appeal is unreasonable absent some other legitimate explanation);[2]

> Footnote 2. We emphasized therein that **when a Rule 35 motion is filed, it will of necessity become the responsibility of defense counsel to precipitate action on the motion within a reasonable time frame, or otherwise provide an adequate record and justification for the delay, in order to avoid the risk of the trial court losing jurisdiction.**

Maggard, 126 Idaho at 479-80, 886 P.2d at 784-85 (eight-month delay without any further action is unreasonable absent explanation for the delay); *State v. Nickerson,* 123 Idaho 971, 974, 855 P.2d 56, 59 (Ct.App.1993) (one-year delay reasonable where execution of sentence stayed and all parties, including trial court, agreed to hold Rule 35 motion in abeyance pending outcome of the defendant's direct appeal); *State v. Brydon,* 121 Idaho 890, 892, 828 P.2d 919, 921 (Ct.App.1992) (five-month delay reasonable where the delay was caused by trial court's stated need for additional information before ruling on the motion). However, in order for this Court to determine the reasonableness of a delay, a defendant must explain or identify some legitimate cause for the delay. The delay must not violate the policies served by the 120-day time limit, including protecting judges from repeated pleas by those sentenced and ensuring that the court does not usurp the responsibilities of parole officials by acting on the motion in light of the movant's conduct while in prison. *Chapman,* 121 Idaho at 353, 825 P.2d at 76, *quoting United States v. Stollings,* 516 F.2d 1287, 1288 (4th Cir.1975).

Here, the record is silent as to the basis for the district court's delay in deciding Simpson's motion. It does appear, however, that the district judge who was sitting at the time Simpson filed his motion was succeeded in office by a different judge and that it was the latter who eventually ruled on Simpson's motion. Under different circumstances, this explanation might be sufficient for this Court to consider the sixteen-month delay to be reasonable. *See State v. Torres,* 107 Idaho 895, 898, 693 P.2d 1097, 1100 (Ct.App.1984) (the consequences of a delay caused in part by the retirement of the original sentencing judge should not be visited upon the

> defendant). However, Simpson had almost completely served the fixed portion of his sentence and would soon be parole-eligible at the time the district court ruled on his motion. Under such circumstances, where the court's assertion of jurisdiction would infringe upon the authority of the Board of Pardons and Parole, we are constrained to agree that the district court lost jurisdiction to act upon Simpson's Rule 35 motion.
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> Accordingly, we affirm the district court's order denying Simpson's Rule 35 motion on the ground that the district court lacked jurisdiction to rule on the motion.

131 Idaho at 197-98, 953 P.2d 637-38 (footnote 1 omitted, bold added on footnote 2). The bold portion of footnote two is especially pertinent to Rice's I.C.R. 35 Motion. At no time has Rice's attorney fulfilled "the responsibility of defense counsel to precipitate action on the motion within a reasonable time frame, or otherwise provide an adequate record and justification for the delay, in order to avoid the risk of the trial court losing jurisdiction." Rice's attorney has at no time asked this Court's Deputy Clerk of the Court for a hearing on Rice's I.C.R. 35(b) Motion, and this Court was reassigned the case over a half a year ago. Rice's attorney has not in any way justified the delay in prosecuting his I.C.R. 35 motion. Due to that failure alone, this Court finds it lacks jurisdiction to now hear Rice's I.C.R. 35 Motion.

The second to last paragraph of *Tranmer* quoted above, references a similar situation where a district judge has retired, and some delay in the hearing of the I.C.R. 35(b) Motion might have been caused by reassignment to a new judge. In *Tranmer*, the Idaho Court of Appeals noted that "the record is silent as to the basis for the district court's delay in deciding Simpson's motion." 131 Idaho at 198, 953 P.2d 638. But footnote two of that decision makes it clear that, "when a Rule 35 motion is filed, it will of necessity become the responsibility of defense counsel to precipitate action on the motion within a reasonable time frame, or otherwise provide an adequate record and justification for the delay, in order to avoid the risk of the trial court losing jurisdiction." In the present case, when Rice's case was reassigned to this Court on January 4, 2023, this Court

simply did not notice that there was an I.C.R. 35(b) Motion pending. It wasn't until this Court prepared for Rice's jurisdictional review hearing that this Court noticed the pending I.C.R. 35(b) Motion. In any event, *Tranmer* makes it clear it was Rice's attorney's responsibility to notify the Court that there was a pending I.C.R. 35(b) motion which needed to be set for hearing, or at least timely decided were the Court to decide the motion without a hearing.

The consequence of that failure by Rice to move the I.C.R. 35 Motion along is was made much more profound once this Court decided on June 1, 2023, to relinquish its jurisdiction on Rice. Rice was sentenced by Judge Wayman on September 1, 2022, and Judge Wayman retained jurisdiction. At sentencing, Rice urged Judge Wayman to consider probation. Obviously, Rice did not like Judge Wayman's decision to retain jurisdiction. Because Rice instead wanted probation, his attorney on December 20, 2022, filed Rice's I.C.R. 35 Motion, specifically requesting probation rather than a retained jurisdiction. Instead of Rice's attorney moving the I.C.R. 35 Motion along, so that Rice may be heard on his request for probation, Rice has waited until ***after*** he has completed the period of his retained jurisdiction (the APSI reads "He [Rice] will be available for his 'Rider' Review Hearing after 05/26/23" Addendum to Presentence Investigation 1), and even to this day, Rice still has not made any attempt to move the I.C.R.35 Motion along. Both the thing Rice wanted in his I.C.R. 35 Motion (probation) and the thing Rice wanted to avoid in his I.C.R. 35 Motion (retained jurisdiction), have now evaporated. Rice's period of retained jurisdiction has been completed and this Court on June 1, 2023, determined that Rice was an inappropriate risk to the public to be supervised on probation. In a very real way, what has happened in Rice's case is much more significant than invading the purview of the Parole Commission, as Rice's relief requested in his I.C.R. 35 Motion (not doing a retained jurisdiction) simply ceases to exist at present.

Additionally, Rice has not filed an appeal to the Idaho Supreme Court. As such, Rice's situation is not similar to a person who files an I.C.R. 35 Motion and simultaneously appeals the district court, as was addressed in *State v. Nickerson*, 123 Idaho 971, 855 P.2d 56 (Ct. App. 1993).

This Court finds that this Court lacks the jurisdiction to hear Rice's I.C.R. 35 Motion. The following two reasons for denying Rice's I.C.R. 35 Motion are discussed only as additional and alternative grounds.

B. RICE'S I.C.R. 35 MOTION MUST BE DENIED BECAUSE RICE HAS STATED NO EVIDENCE, NO NEW EVIDENCE AND NO RELEVANT EVIDENCE.

1. No "Evidence" has been presented.

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, Rice 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 Rice could have presented in support of his Rule 35 Motion. Because Rice 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, counsel for Rice stated in his I.C.R. 35 Motion, "Additional evidence may include testimony from the defendant and additional witnesses." Mot. for Modification of Sentence Pursuant to I.C.R. 35(b), 2. However, there is no indication in the I.C.R. 35 Motion about which Rice or other witnesses would be testifying. Counsel for Rice writes:

> 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. The defendant has been sexually assaulted while incarcerated, a CPS referral has been made by his children's daycare due based upon their current living environment, and his fiancé had to relocate to California and is suffering from severe depression since the birth of their child. The defendant has no prior experience in the felony court system and has the community relations and family support necessary to successfully complete community-based treatment while on supervised probation.

Id. The first sentence, "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", truly tells this Court nothing. This exact sentence finds its way into over half of the I.C.R. 35 Motions this Court currently reviews. As an example, in a different case decided by this Court just three weeks ago, in a brief written by a different attorney, this Court quoted that attorney as follows:

> In that motion, counsel for Guffey stated the basis of his motion as follows: "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" (Mot. for Modification of Sentence Pursuant to I.C.R. 35(b), 2).

State v. Jason Robert Guffey, Kootenai County Case Nos. CR28-20-9103, CR28-22-18381, Memorandum Decision and Order Denying Defendant's Motions for Modification of Sentence Pursuant to I.C.R. 35(b), filed May 16, 2013, at page 6. The fact that this sentence is so prevalent in the First Judicial District does not change the fact that the sentence tells the Court not one thing. Most importantly, that first sentence is not evidence. It is simply a "claim" by Rice's attorney. It is a claim which is entirely irrelevant to any sentencing decision. Nowhere in *State v. Toohill,* 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982), or in any of the large litany of cases subsequently citing *Toohill*, is the factor, "the collateral negative impact a sentence of the current nature places upon the defendant and his future," listed as a consideration for a sentencing judge. The four *Toohill* factors are: "(1) protection of society, (2) deterrence of the individual and the

public generally, (3) possibility of rehabilitation, and (4) punishment." 103 Idaho at 568, 650 P.2d at 710. The Court notes that remainder of the above paragraph from Rice's I.C.R. 35(b) Motion, simply builds on the "collateral negative impact" the sentence has on Rice (sexual assault while incarcerated, the impact of Rice's imprisonment on his fiancé and his children), but none of that is evidence either. None of that is "new" evidence (discussed below) and none of that is "relevant" evidence under the factors of *State v. Toohill*, as discussed below. As mentioned above, 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). Rice has not filed an affidavit where he describes under oath his sexual assault while incarcerated. We have no idea where the claimed sexual assault took place, was it at the Kootenai County Jail, was it at RDU, was it at NICI? His fiancé has not filed an affidavit. Without the affidavits, this Court has before it "no evidence." Even if the Court were presented with affidavits of Rice and his fiancé, this Court would have no "new evidence" and no "relevant evidence" submitted by Rice, as discussed below.

2. No "New Evidence" Has Been Presented.

The Court has reviewed Rice's I.C.R. 35 motion. In that motion, Rice's attorney expresses Rice's concerns about the impact of his imprisonment on his fiancé and his children. The Court has also re-reviewed the minutes of the September 1, 2022, sentencing hearing in Rice's case. At sentencing, Rice's attorney argued, "He chose to plead because it was the best thing for his family. My client had a 6 m/o baby when the accusation was made, he has another child now and another one on the way. He asks the Court to put him on probation and not taken away from his family." September 1,

2022, Court Minutes 2, at 10:20:52 a.m. His attorney continued, "Let him be on probation and show he can be successful, he will do whatever it takes, he just wants to be with his family." *Id.* at 3, at 10:29:44 a.m. Rice told Judge Wayman, "I will do whatever it takes to be on probation and prove I'm not a harm to society. I need help for what I've gone through, I will do whatever it takes to keep my family together." *Id.* Ayonna Rice (the mother of Rice's children) wrote to Judge Wayman, "Brandon needs to watch his kids grow and be there for there [sic] support as well as mine in providing for our children and his baby on the way." Notice of Filing Defendant's Sentencing Materials, filed August 31, 2022, 3. The impact of Rice's imprisonment on his fiancé and his children was clearly and repeatedly made apparent to Judge Wayman at the time of sentencing. All Rice is doing in his I.C.R. 35(b) Motion is repeating that evidence, or more accurately, repeating those "claims" his attorney made at sentencing.

Here, Rice has not set forth any new evidence that could be adduced at hearing on his I.C.R. 35(b) motion. Ignoring for the moment that Rice has not submitted an affidavit (his counsel has only made "claims"), the impact on Rice and his family is not new evidence.

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*, evidence or argument about the effect of Rice's imprisonment on Rice's family "was not 'new' in that it did not pertain specifically to his case or culpability."

Another case which discusses whether the evidence must be "new" is *State v. Smith*, 161 Idaho 162, 384 P.3d 409 (Ct. App. 2016). There, 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 Rice's I.C.R. 35(b) motion presents no new information, and no relevant information. Accordingly, under *Smith*, Rice'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. Rice's doing so was not reasonable. The Idaho Court of Appeals concluded in *Smith*:

> **B. Rule 35 Motion**
>
> 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.

The concept of "new" evidence is discussed more frequently in federal case law. One reason for that is the applicable federal rule does a better job of defining new evidence. The Federal Criminal Rule is different from I.C.R. 35. Federal Rule of Criminal Procedure 35(b)(2)(A)-(C) reads:

> (2) *Later Motion*. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:
> (A) information not known to the defendant until one year or more after sentencing;
> (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or
> (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

In the present case, at sentencing, Rice had to know that he would be incarcerated for at

least some period of time. These are very serious crimes, and Rice was summonsed in so he had not spent any time in custody prior to the September 1, 2022, sentencing hearing. Avoiding some time in custody following his sentencing hearing was a virtual impossibility. Rice also knew the impact his incarceration would have on him and his family, and this was discussed before Judge Wayman. The impact of Rice's incarceration was discussed at his sentencing hearing, and it is certainly not "new" evidence at the time of his I.C.R. 35(b) motion.

In *United States v. Edna Coonan*, 750 F.Supp. 652, 657 (S.D. New York, 1990) citing *U.S. v. Ellenbogen* (2d Cir.) 390 F.2d 537, 543, *cert. denied,* 393 U.S. 918, 89 S.Ct. 241, 21 L.Ed.2d 206 (1968), the trial court held: "Rule 35 was intended to provide the sentencing judge with an opportunity to reconsider the sentence imposed in light of new evidence not available at the time of sentencing." In *Coonan*, this "new" evidence was statements made by the co-defendants after the trial. The court granted Coonan's Rule 35 Motion and placed her on probation. In *U.S. v. Gaertner*, 590 F.Supp. 271, 273 (E.D. Wisconsin, 1984), the trial court held one of the purposes of Rule 35 is to permit defendants to present new evidence not available at the time of sentencing.

3. No "Relevant Evidence" Has Been Presented.

It is mentioned above that because there is no affidavit or declaration from Rice, there is no "evidence" of a sexual assault while incarcerated and there is no "evidence" of negative effect upon Rice or his family. All we have are "claims" made by Rice's attorney. Even if we had affidavit or declaration testimony from Rice or others regarding these claims, such claims, such facts, would not be relevant. As mentioned above, nowhere in *State v. Toohill,* 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982), or in any of the large litany of cases subsequently citing *Toohill*, is the factor, "the collateral negative

impact a sentence of the current nature places upon the defendant and his future," listed as a consideration for a sentencing judge. Nor is "sexual assault while incarceration" found as a factor in *Toohill*. Nor is the "negative effect of defendant's incarceration on defendant and defendant's family" found as a factor in *Toohill*. The four *Toohill* factors are: "(1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment." 103 Idaho at 568, 650 P.2d at 710. Those are the factors this Court must keep in mind in any sentencing decision. "Collateral negative impact", "sexual assault while incarcerated", and the impact of Rice's imprisonment on his fiancé and his children, are not "relevant" evidence under the factors of *State v. Toohill*.

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

Rice has no prior felony criminal record. But given the horrific nature of Rice's crimes, given the fact that he has multiple child victims upon whom he afflicted similar conduct upon on different child victims on different dates, given the lifelong damage Rice caused his victims, given Rice's refusal to admit what he has done (having pled guilty pursuant to *North Carolina v. Alford* and continuing to maintain he is innocent), given that Rice's refusal to admit his actions prevents him from receiving sex offender treatment (Psychosexual Evaluation 17), given the assessed danger Rice presents to the public (*Id.* at 11-18), and most importantly, given the fact that Rice, even to this day, has not undergone a full disclosure polygraph test, **something he was contractually bound to do** under the Pretrial Settlement Offer, for Rice to even suggest that he is entitled to probation, is the pinnacle of temerity.

The two felony injury to child crimes to which Rice pled guilty (albeit an *Alford* plea) are described in the psychosexual evaluation as follows:

> He is currently going through court proceedings due to sexually assaulting two pre-pubescent females on two separate occasions. One victim was a then 7-year-old female Mr. Rice was babysitting at the time. He isolated her outside from the other children who were at the home and made her touch his penis while he was urinating in a bush. The other victim is Mr. Rice's stepsister who was aged 7-8 years old at the time of the offense. Mr. Rice told his stepsister to lay down on his bed and watch as he masturbated to ejaculation. He told her that he would "beat her up" if she told anyone about the incident. Both incidences occurred in 2016 and were reported to law enforcement; however, it wasn't until 2021 that the victims were forensically interviewed and charges were filed.

Psychosexual Evaluation 16-17. Here is what Robert K. Wyatt, MSW, LCSW, Senior Certified (Sex Offender) Evaluator, had to say about Rice's ability to be treated as a sex offender:

> He would be a poor candidate for sex offender-specific treatment at this time given that he categorically denies any wrongdoing. Should Mr. Rice present as amenable to sex offender treatment in the future, it will be important for him to address his attitudes supportive of sexual offending, poor problem-solving skills, social rejection and potential deviant arousal toward pre-pubescent females.

Id. at 17. Additionally:

> Mr. Rice's interest in and motivation for treatment is somewhat below average in comparison to adults who are not being seen in a therapeutic setting. Furthermore, his level of treatment motivation is substantially lower than is typical of individuals being seen in treatment settings.

Id. at 12. Wyatt evaluated Rice as an "Average" risk to reoffend:

> **Estimated Risk Classification:**
> Mr. Rice was scored in the moderate density range of criminogenic needs on the STABLE-2007 and was preliminarily placed in Level III on the Static-99R. When these measures are combined, his composite assessment places him in Level III for supervision and intervention using the standardized risk framework.

Id. at 15. Wyatt concluded:

> In review of the facts of this case, Mr. Rice denies both offenses and offers very elaborate, conspiratorial explanations as to why he believes he has been wrongly accused. He referenced in significant details his experience of being sexually abused and tortured by his father. Whether or not there is any truth to him experiencing childhood sexual abuse is unclear; regardless, it is apparent he uses this reported trauma in what this evaluator believes to

> be an attempt to avoid responsibility and garner sympathy. Mr. Rice openly expresses his belief that he is the true victim in this case and that others are exacting revenge on him. His tendency to exaggerate or malinger reported trauma symptoms is supported in his PAI scores. There appears to be paranoid features to his personality and how he views his relationships with others. **He is encouraged to participate in a full-disclosure polygraph, which he stated he is willing to do**. From this point forward, there should be no reason he should have access to underage females. While under supervision, if he is found to be in the presence of underage females, he should be revocated immediately, as he would present as an aggravated risk to the community.

Id. at 18. (bold added). The most troubling aspect of this case is the lack of a full disclosure polygraph, coupled with the fact Rice denies committing these three crimes to which he pled guilty via an *Alford* plea. Without that "full disclosure polygraph (asking about other sexual contact w/minors)" (Pretrial Settlement Offer 1), to which Rice was contractually bound, as part of a mediated settlement, to submit to and provide to Prosecuting Attorney and to the Court for sentencing, there is too much uncertainty for this Court to consider probation. As a result of Rice's failure to obtain his contractually required "full disclosure polygraph (asking about other sexual contact w/minors)", there is no way for this Court to know if Rice would test deceptive or not on committing these two crimes, and there is no way of knowing whether Rice would test deceptive or not on having committed other sex crimes in the past. Because Rice denies committing these crimes, he is entirely not amenable to sex offender treatment (Psychosexual Evaluation 17), and without such sex offender treatment, Rice will remain at least an average risk to reoffend with another sex crime in the future. Such scenario is not acceptable to this Court. This Court cannot perform its paramount duty, protecting the public, under that scenario. That scenario was put in place almost exclusively on Rice's decision not to get a "full disclosure polygraph (asking about other sexual contact w/minors)". Pretrial Settlement Offer 1. Rice truly had the keys to the penitentiary in his hands, all he had to do was obtain the full disclosure polygraph. Rice's failure to do that which he was

contractually obligated, leaves Rice in a position where imposition of his prison sentences are the only logical decision this Court can make.

This Court finds it lacks jurisdiction to hear Rice's I.C.R. 35(b) motion. This Court finds absolutely no evidence has been presented, no new evidence has been presented, and no relevant evidence has been presented by counsel for Rice in support of his I.C.R. 35(b) Motion. This Court specifically finds that given the severity of Rice's crimes, Rice's inability to be treated, Rice's average risk to reoffend, and the lack of a full disclosure polygraph, placing Rice on probation at this time is impossible for this Court. If Rice were to be asking for a reduction in his sentence, reducing Rice's sentences 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).

III. RICE IS NOT ENTITLED TO A HEARING ON HIS I.C.R. 35(b) MOTION.

The Court exercises its discretion and decides these I.C.R. 35(b) motions without a hearing. There is no need for a hearing if this Court lacks jurisdiction to hear Rice's I.C.R. 35(b) Motion, and this Court finds it lacks that jurisdiction due to Rice's failure to prosecute his motion. This Court finds absolutely no evidence, no new evidence and no relevant evidence has been presented by counsel for Rice in support of his I.C.R. 35(b) Motions. This Court specifically finds that placing Rice on probation or reducing either of Rice's sentences 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). For the above mentioned reasons, this Court exercises its discretion and Rice's I.C.R. 35 Motion in this case is denied without a hearing.

IV. ORDER.

IT IS HEREBY ORDERED that defendant Rice's I.C.R. 35 motion is **DENIED** for the reasons set forth above: Rice has waited too long to have this matter heard, Rice has

submitted no new evidence, and Rice's motion is devoid of any merit.

NOTICE OF RIGHT TO APPEAL

YOU, BRANDON LOUIS RICE 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 12th day of June, 2023.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

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

Prosecuting Attorney – Stan Mortensen
kcpacourts@kcgov.us
Defense Attorney – Jed Nixon
filing@nixonlawoffice.com
BRANDON LOUIS RICE
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Idaho Department of Correction
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CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____, Deputy