STATE OF IDAHO)
County of KOOTENAI) ss
FILED 4/23/2023
AT 2:30 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.

SHAWN CURTIS FLEWELL
DOB: 10/12/1985
SSN: XXX-XX-9735
IDOC: 145727

Defendant.

Case No. **CR28-22-11455**

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

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On January 6, 2023, this Court sentenced Shawn Curtis Flewell (Flewell) to a four year fixed sentence followed by a three year indeterminate sentence for a total unified sentence of seven years for the felony crime Possession of a Controlled Substance (Methamphetamine). The Court utilized a period of retained jurisdiction under I.C. §19-2601. On April 26, 2023, this Court reviewed a report from Idaho Department of Correction, Marnie Shippey, Case Manager at the North Idaho Correctional Institution in Cottonwood, Idaho, which recommended that the court relinquish jurisdiction on Flewell. The reason for that recommendation was that, "Even with guidance from mentors on his tier and warnings from Unit officers, Mr. Flewell was unable to act in accordance with the facility rules and regulations." Report 1. On April 26, 2023, this Court filed its Retained Jurisdiction Disposition and Notice of Right to Appeal wherein this Court relinquished its jurisdiction over Flewell and imposed his prison sentence. Retained Jurisdiction Disposition 1-2. On May 9, 2023, Flewell's court-appointed attorney, Dana Bowes filed a Notice of Withdrawal Pursuant to ICR 44.1, notifying the Court, counsel for the plaintiff

and Flewell, that she was withdrawing after the time for appeal of this Court's April 26, 2023, decision had passed. This would have occurred about June 7, 2023.

On June 21, 2023, Flewell, now *pro se*, filed the following: Motion for Correction or Reduction of Sentence, ICR 35; Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (prisoner), Motion and Affidavit in Support for Appointment of Counsel, Motion for Hearing (on his ICR 35 Motion). This Court finds that all of Flewell's motions must be denied without a hearing.

First, there is no filing fee for an I.C.R. 35 Motion, so Flewell's Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (prisoner) is denied for that reason alone.

Second, Flewell's Motion and Affidavit in Support for Appointment of Counsel must be denied as Flewell has chosen to proceed pro se, in filing his I.C.R. 35 Motion, while simultaneously requesting a court appointed attorney. Flewell has timely filed a *pro se* I.C.R. 35 Motion, which Flewell is entitled to do. However, this Court knows of no requirement that Flewell be granted a court-appointed attorney to prosecute the *pro se* I.C.R. 35 Motion which Flewell has already filed.

Third, Flewell's Motion for Hearing (on his I.C.R. 35 Motion) must be denied for the reasons set forth below.

Fourth, and finally, Flewell's I.C.R. 35 Motion must be denied, for the reasons set forth below.

II. FLEWELL'S I.C.R. 35 MOTION MUST BE DENIED BECAUSE FLEWELL 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.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, Flewell 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 Flewell could have presented in support of his Rule 35 Motion. Because Flewell 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.

Flewell states in his I.C.R. 35 Motion: "The Court should reconsider its earlier sentence and reduce the same on the following grounds...I feel that 4 years fiexed is excessive & I would like my fixe [sic] time cut in half, I was given a D.R.R. & I was the one who was assaulted my ryder [sic] was taken and I was given my time. This is my first drug offense in Idaho." There is no new evidence stated in Flewell's I.C.R. 35 Motion. There is no indication in the I.C.R. 35 Motion about which Flewell or any other witnesses would be testifying about at any hearing on Flewell's I.C.R. 35 Motion.

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." Flewell has stated no new "evidence", he has only stated his desire to have his sentence cut in half. Not only is there no "evidence" provided by Flewell, he has not set forth any "reason" why he should have his sentence cut in half. 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.
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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*, argument about why he had his jurisdiction relinquished {"I was given a D.R.R. & I was the one who was assaulted") is not "new" evidence, and even the argument itself is not related to the relief Flewell seeks, which is a reduction by half of his sentence.

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

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

Flewell pled guilty and then on November 1, 2022, failed to appear for his

sentencing hearing. A Bench Warrant was served and Flewell was eventually sentenced on January 6, 2023. Counsel for the plaintiff recommended imposition of sentence due to Flewell's failure to appear at sentencing, failure to comply with treatment in the past, and being a high risk to reoffend. This Court placed Flewell on a period of retained jurisdiction to give Flewell the opportunity that he could take recovery seriously and be a good candidate to succeed on probation. Instead, Flewell was documented by Idaho Department of Correction to be "verbally harassing another resident so severely that it culminated in Mr. Flewell being headbutted." Such behavior is certainly no indication that Flewell is taking recovery seriously and it is certainly an indication that Flewell will perform horribly on supervised probation. There is no reason for this Court to reduce Flewell's sentence by half. Flewell has a horrible criminal record. He has a felony Assault With a Deadly Weapon conviction in 2002, felony Possession of a Controlled Substance in 2004, felony Assault in 2008, felony Stalking and two counts of Grand Theft in 2009, another Assualt in 2016, a felony Assault in 2016, felony Burglary in 2019, and this offense which occurred on July 19, 2022. Presentence Report 10-12. This Court specifically finds that given the severity of Flewell's past crimes, many of which are violent, his lack of desire to treat his mental health and addiction issues, any reduction in 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).

IV. FLEWELL 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 Flewell 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, Flewell's I.C.R. 35 Motion in this case is denied without a hearing.

IV. ORDER.

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

IT IS FURTHER ORDERED that defendant Flewell's Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (prisoner), is **DENIED** for the reasons set forth above.

IT IS FURTHER ORDERED that defendant Flewell's Motion and Affidavit in Support for Appointment of Counsel, is **DENIED** for the reasons set forth above.

NOTICE OF RIGHT TO APPEAL

YOU, SHAWN CURTIS FLEWELL 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 23rd day of June, 2023.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 23 day of June, 2023 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Prosecuting Attorney – Stan Mortensen
kcpaicourtsec@gov.us

Defense Attorney – Dana Bowes
danabowes@northidahlawgroup.com

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CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____, Deputy