STATE OF IDAHO)
County of KOOTENAI) ss
FILED 10/10/2023
AT 4:45 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.

LESLIE DAWN ELLIS
DOB: xx/xx/1992
SSN: XXX-XX-
IDOC: 154328

Defendant.

Case No. **CR28-23-7021**

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

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On September 19, 2023, this Court imposed LESLIE DAWN ELLIS' (Ellis) sentence as follows:

POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE), I.C. 37-2732(c)(1).	To the custody of the State of Idaho Board of Correction for a fixed sentence of ONE (1) year followed by an indeterminate term of TWO (2) years for a total unified sentence of THREE (3) years.

September 19, 2023, Sentence Disposition, 2. The Court retained jurisdiction pursuant to Idaho Code § 19-2601. *Id.* On October 5, 2023, Ellis, through counsel, filed a "Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support" (I.C.R. 35(b) Motion). Ellis, through counsel, states: "This motion is made as a plea for leniency." I.C.R. 35(b) Mot. 1. Counsel for Ellis claims: "The basis for such argument is that defendant has a current substance abuse evaluation and treatment lined up, and also the current sentences' direct harm the continued custody status places upon defendant's physical health." *Id.* at 2. Counsel for Ellis further claims:

> Additional evidence will include defendant's current substance abuse evaluation, treatment confirmation, and testimony from the defendant regarding her current health status, and further documentation in support of the defendant's request.

Id. at 3. Counsel for Ellis requested a hearing before the Court on her I.C.R. 35(b) Motion. *Id.* This Court finds Ellis' I.C.R. 35(b) motion must be denied without a hearing for the following reasons.

II. ANALYSIS.

A. ELLIS' I.C.R. 35 MOTION MUST BE DENIED BECAUSE ELLIS HAS STATED NO NEW, RELEVANT EVIDENCE.

A motion to modify a sentence "shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion." I.C.R. 35; *see State v. Copenhaver,* 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James,* 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct. App. 1986) (it is the defendant's burden to present any additional evidence and the court cannot abuse its discretion in "...unduly limiting the information considered in deciding a Rule 35 motion"); *State v. Puga,* 114 Idaho 117, 118, 753 P.2d 1263, 1264 (Ct. App. 1987). "The decision whether to conduct a hearing on an I.C.R. 35 motion to reduce a legally-imposed sentence is directed to the sound discretion of the district court." *State v. Peterson,* 126 Idaho 522, 525, 887 P.2d 67, 70 (Ct. App. 1994).

Where a sentence as originally imposed is not illegal, the defendant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown,* 121 Idaho 385, 393, 825 P.2nd 482, 490 (1992). "To establish that the sentence imposed was improper, the defendant must show that in light of the governing criteria, [the] sentence was excessive under any reasonable view of the facts." *Id.* (quoting *State v. Broadhead*, 120 Idaho 141, 143-45, 814 P.2d 401, 403-05 (1991) (citations omitted)). When a defendant does not identify what evidence he or she might have produced at a hearing that could not have been produced through affidavits, the district court does not

abuse its discretion in refusing to hold a hearing on his or her Rule 35 motion. *State v. Ramirez*, 122 Idaho 830, 836, 839 P.2d 1244, 1250 (Ct. App.1992). Specifically, the Idaho Court of Appeals held:

> This Court has previously held that while a defendant is entitled to be present at sentencing and at resentencing when a prior invalid sentence is corrected, no such right exists on a motion to reduce a sentence. *State v. James,* 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct. App.1986). "Indeed, the decision whether even to conduct a hearing on a Rule 35 motion has always been discretionary with the district court." *Id.* A trial court abuses its discretion on whether to hold a hearing on a Rule 35 motion when it unduly limits information considered in deciding the motion. *James,* 112 Idaho at 242, 731 P.2d at 237. Ramirez has failed to show that the district court unduly limited the available information in this case. Ramirez does not even identify what evidence he might have produced at a hearing that he was unable to produce through the affidavits which were submitted.

Id. (footnote omitted). Here, Ellis 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 Ellis could have presented at a hearing in support of her Rule 35 Motion. Because Ellis has completely failed to give any indication of any relevant facts which would support her claims, her Rule 35 Motion must be denied due to that failure alone. Ellis' desire for supervised probation is not supported by any relevant, admissible, new evidence.

Without presenting any new explanation as to why this Court was incorrect in retaining jurisdiction at the September 19, 2023, sentencing hearing, and without any presenting any new evidence, this Court has absolutely nothing upon which to base any I.C.R. 35(b) relief, let alone the specific relief of a period of supervised probation.

Several Idaho appellate cases which discuss whether the evidence presented in an I.C.R. 35(b) motion must be "new" evidence. One of those cases is *State v. Campbell*, 170 Idaho 232, 509 P.3d 1161 (May 16, 2022). The Idaho Supreme Court held:

> The district court did not abuse its discretion in denying the

> Rule 35(b) motion for leniency. In Campbell's original Rule 35 motion, he stated that "additional information" showed that he was at a greater risk of violence in adult prison and that rehabilitation efforts would be thwarted by the current sentence, citing a wide range of both legal and scientific articles regarding juvenile offenders published between 1994 and 2017. In denying Campbell's motion, the district court effectively concluded that this information was not new because it had already considered Campbell's age at sentencing.
>
> 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*, Ellis' request for supervised probation is not based on any "new" evidence. Most importantly, the argument for supervised probation is not related to any of the *Toohill* factors. Essentially, Ellis is simply arguing the Court to reconsider its decision, without any new evidence or even new argument.

Another case discussing whether the evidence must be "new" is *State v. Smith*, 161 Idaho 162, 384 P.3d 409 (Ct. App. 2016), in which the Idaho Court of Appeals held:

> In presenting a Rule 35 motion, a defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). Thus, any colorable merit to a Rule 35 motion must arise from new or additional information presented in the motion or accompanying documentation that would create a basis for reduction of the sentence. *Wade*, 125 Idaho at 525, 873 P.2d at 170. **A Rule 35 motion that does not present such new information is not one that a reasonable person with adequate means would bring before the district court at his or her own expense and is, therefore, frivolous.** *Carter*, 157 Idaho at 903, 341

> P.3d at 1272. Moreover, a Rule 35 motion is frivolous if the basis for the claim was previously considered by the district court. *Carter*, 157 Idaho at 902–03, 341 P.3d at 1271–72.

161 Idaho at 164, 384 P.3d at 411. (bold added). This Court specifically finds Ellis' I.C.R. 35(b) motion presents no new information, and no new relevant information. Accordingly, under *Smith*, Ellis' 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. Ellis' 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. Ellis has presented this Court with no new evidence. That failure alone is reason for this Court to deny Ellis' I.C.R. 35(b) Motion without holding a hearing.

At first blush, Ellis' I.C.R. 35 Motion in each discusses "additional" evidence, but none of it is "new" evidence, and none of it is "relevant" evidence. As mentioned above, counsel for Ellis claims:

> Additional evidence will include defendant's current substance abuse evaluation, treatment confirmation, and testimony from the defendant regarding her current health status, and further documentation in support of the defendant's request.

Id. at 3. Additional evidence is not necessarily "new" evidence, and the case law discussed above shows that a motion brought under I.C.R. 35(b) must be supported by new evidence.

The Court will address each assertion in the above sentence written by Ellis' attorney, specifically that the "additional evidence" will include the defendant's current substance abuse evaluation, treatment confirmation, testimony from the defendant regarding her current health status, and further documentation in support of the defendant's request.

First, the Court has reviewed the substance abuse evaluation and finds no new, relevant evidence contained therein that was not already contained in the PSI relied on by the Court at the September 19, 2023, hearing. The only additional evidence that the Court can abduct from the Evaluation is the emphasis of Ellis' mothers passing in 2017. However, this is not **new** information nor is it relevant to this Court's decision. Counsel for Ellis additionally claims that the additional evidence provided includes "treatment confirmation." However, a review of the substance abuse evaluation filed shows that, in regards to treatment, the Evaluation states that, "Clients have the option to chose their treatment provider. The following are providers in our local area offering the recommended treatment." Evaluation, 7. No other documentation is provided for by Ellis or her counsel. The statement that there are treatment facilities in the area does not provide any new evidence or information to the Court, nor does it confirm that the facilities have the current capacity to treat Ellis at this time. This information is thus not **new** or **relevant** evidence. Counsel for Ellis then claims that the additional evidence would include testimony from the defendant regarding her current health status. The Court was informed at the September 19, 2023, sentencing hearing that Ellis suffered from health issues that could be affected by being incarcerated. A review of the court minutes

provides that Ellis' health status was brought up by both Ellis and her Counsel. Additional testimony from the defendant regarding her current health status would not be **new** evidence. Finally, counsel for Ellis claims that additional evidence will include further documentation in support of the defendant's request. This tells the Court absolutely nothing. It tells the court that there could be further documentation provided, but makes no mention of what the documentation would be or how it would support Ellis' request. Ellis has provided no new evidence.

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

This Court utilized a presentence report dated September 13, 2023. Though Ellis does not have any convictions, prior criminal history, the defiance of the Court's Order in the present case is telling. On July 5, 2023, this Court ordered to Ellis to submit to drug testing 4 times a month. Ellis' first drug test on July 17, 2023, and subsequent test on July 20, 2023, were positive for cannabinoid. Ellis did not report for drug testing on August 1, 2023, and the following day, Ellis tested positive for cannabinoid and had abnormal levels of creatinine. Ellis next drug tested on August 14, 2023, and was again positive for cannabinoid. Thereafter, Ellis tested positive for the remaining drug tests up until sentencing.

The Court exercises its discretion and decides Ellis' I.C.R. 35(b) motion without a hearing. This Court finds absolutely no new evidence and no relevant evidence has been presented by counsel for Ellis in support of her I.C.R. 35(b) Motion.

Ellis' request for this Court to essentially reconsider its earlier decision without any new evidence or argument is unavailing. The Idaho Court of Appeals found a similar argument unavailing. In *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986), Anderson filed an I.C.R. 35(b) motion in which he did not argue the severity of the

sentence when imposed, but rather argued prison presented a "lack of rehabilitation programs, overcrowding and violence and his severe pain and discomfort due to the lack of proper medical treatment in prison as reasons to reduce his sentence." 111 Idaho at 123, 721 P.2d at 223. In affirming the district court's denial of Anderson's I.C.R. 35(b) Motion without a hearing, the Idaho Court of Appeals held:

> The record shows that the district court considered the information. Even if we assume that the statements, concerning Anderson's health difficulties, good conduct and prison overcrowding and violence, contained in the motion are true, we cannot say that the district judge abused his discretion in determining that they were insufficient to overcome the original reasons for the sentence imposed. Those reasons included the nature of the crime, "a history of criminal activity," with convictions for "lots of prior felonies and prior offenses." When he sentenced Anderson, the district judge made it clear that he had little expectation Anderson would ever be rehabilitated. The judge was guided more by Anderson's "past conduct" than by "promises of future behavior." Although rehabilitation and health difficulties may be factors to weigh in considering a motion for reduction of sentence, they are not necessarily controlling. *See State v. Rundle*, 107 Idaho 936, 694 P.2d 400 (Ct.App.1984). Other factors include deterrence and protection of society. *State v. Toohill*, supra.
>
> Having reviewed all the information available, we conclude that the district court did not abuse its discretion in failing to exercise leniency based upon information contained in the motion without conducting a hearing. Accordingly, the order denying the Rule 35 motion is affirmed.

Id. This Court specifically finds that releasing Ellis immediately onto a period of supervised probation would not allow this Court to fulfill its paramount responsibility, protecting the public. *State v. Toohill,* 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). In *Toohill,* the Idaho Court of Appeals set forth the factors a Court should consider in imposing a sentence: "(1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment." *Id.* The requested relief would be anathema with this Court's paramount duty to protect the public. Further, the requested relief would not deter the individual or public generally or provide a possibility of rehabilitation.

III. ORDER.

IT IS HEREBY ORDERED that defendant **LESLIE DAWN ELLIS'** I.C.R. 35(b) motion is **DENIED** for the reasons set forth above: Ellis has submitted no new evidence, Ellis' motion is devoid of any merit and is frivolous.

NOTICE OF RIGHT TO APPEAL

YOU, LESLIE DAWN ELLIS, 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 10th day of October, 2023.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of October, 2023 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Prosecuting Attorney – Stan Mortensen
Defense Attorney – Jonathan Williams

LESLIE DAWN ELLIS
IDOC # 154328

Idaho Department of Correction
Records Division (certified copy)
~~Fax: (208) 327-7445~~ centralrecords@idoc.idaho.gov

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____, Deputy