STATE OF IDAHO)
County of KOOTENAI) ss
FILED 09/05/2023
AT 4:55 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.

JANELL MARIE MARTINEZ
DOB: xx/xx/1979
SSN: XXX-XX-6319
IDOC: 114568

Defendant.

Case No. **CR28-23-7357**

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

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On July 24, 2023, this Court revoked probation and imposed Janell Marie Martinez' (Martinez) prison sentence in CR28-19-9991 (two years fixed followed by two years indeterminate for a total unified sentence of four years for the felony crime of possession of a controlled substance, heroin), and sentenced Martinez in CR28-23-7357 to a prison sentence of three years fixed followed by four years indeterminate for a total unified sentence of seven years for the felony crime of possession of a controlled substance, fentanyl. The Court imposed that new sentence in CR28-23-7357 to run **consecutive** to the older sentence in CR28-19-9991. CR28-23-7357, Judgment and Sentence and Notice of Right to Appeal 2. In both cases, the Court retained jurisdiction on Martinez pursuant to I.C. § 19-2601. *Id.*

On August 30, 2023, Martinez, through her attorney, Lisa Chesebro, in CR28-23-7357, timely filed a "Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support" (I.C.R. 35(b) Motion). No similar I.C.R. 35(b) motion was filed

in Martinez' older case, CR28-19-9991. This Court notes that on January 13, 2022, Martinez, through different counsel, had already filed an I.C.R. 35(b) motion in CR28-19-9991. That motion was denied on February 28, 2022. Successive I.C.R. 35 motions are prohibited.

Presently, in her I.C.R. 35(b) Motion in the new case, CR28-23-7357, Martinez, through counsel, "requests modification of her sentence by the Court, specifically that her sentence run concurrently with her other case sentences." I.C.R. 35(b) Motion 2. Counsel for Martinez (a conflict public defender) adds the apparent obligatory language used by the Office of the Kootenai County Public Defender: "The basis for such argument consists of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his [her] future." *Id.* Counsel for Martinez claims, "Additional evidence will likely include testimony from Ms. Martinez and possible other individuals, and potentially documentation in support of her request." *Id.* Counsel for Martinez requested a hearing before the Court on her I.C.R. 35(b) Motion. *Id.*

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

II. ANALYSIS.

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

A motion to modify a sentence "shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion." I.C.R. 35; *see State v. Copenhaver,* 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James,* 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct. App. 1986) (it is the defendant's burden to present any additional evidence and the court cannot abuse its discretion in "...unduly limiting the information considered in

deciding a Rule 35 motion"); *State v. Puga,* 114 Idaho 117, 118, 753 P.2d 1263, 1264 (Ct. App. 1987). "The decision whether to conduct a hearing on an I.C.R. 35 motion to reduce a legally-imposed sentence is directed to the sound discretion of the district court." *State v. Peterson,* 126 Idaho 522, 525, 887 P.2d 67, 70 (Ct. App. 1994).

Where a sentence as originally imposed is not illegal, the defendant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown,* 121 Idaho 385, 393, 825 P.2nd 482, 490 (1992). "To establish that the sentence imposed was improper, the defendant must show that in light of the governing criteria, [the] sentence was excessive under any reasonable view of the facts." *Id.* (quoting *State v. Broadhead,* 120 Idaho 141, 143-45, 814 P.2d 401, 403-05 (1991) (citations omitted)). When a defendant does not identify what evidence he or she might have produced at a hearing that could not have been produced through affidavits, the district court does not abuse its discretion in refusing to hold a hearing on his or her Rule 35 motion. *State v. Ramirez,* 122 Idaho 830, 836, 839 P.2d 1244, 1250 (Ct. App.1992). Specifically, the Idaho Court of Appeals held:

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

Id. (footnote omitted). Here, Martinez 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 Martinez could have presented at a hearing in support of her Rule

35 Motion. Because Martinez has completely failed to give any indication of any relevant facts which would support his claims, her Rule 35 Motion must be denied due to that failure alone. Martinez' desire to have the two sentences run concurrent is not supported by any relevant, admissible, new evidence.

Without presenting any new explanation as to why this Court was incorrect in not sentencing concurrently on July 24, 2023, 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 concurrent sentences.

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*, Martinez' request

for concurrent sentences is not based on any "new" evidence. Most importantly, the argument or request for concurrent sentences is not related to any of the *Toohill* factors. Essentially, Martinez is simply arguing the Court to reconsider its decision, without any new evidence or even new argument.

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

> In presenting a Rule 35 motion, a defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). Thus, any colorable merit to a Rule 35 motion must arise from new or additional information presented in the motion or accompanying documentation that would create a basis for reduction of the sentence. *Wade*, 125 Idaho at 525, 873 P.2d at 170. **A Rule 35 motion that does not present such new information is not one that a reasonable person with adequate means would bring before the district court at his or her own expense and is, therefore, frivolous.** *Carter*, 157 Idaho at 903, 341 P.3d at 1272. Moreover, a Rule 35 motion is frivolous if the basis for the claim was previously considered by the district court. *Carter*, 157 Idaho at 902–03, 341 P.3d at 1271–72.

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

As set forth above, Martinez' counsel's claim that, "The basis for such argument consists of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his [her] future" (I.C.R. 35(b) Mot. 2) is not any evidence, it is simply argument, a baseless one at that. Such argument is nothing more than a throw away sentence which tells this Court absolutely nothing. The sentence has become *de rigueur* in the local legal defense community, especially the Kootenai County Public Defender's Office and with conflict public defenders. As pointed out by this Court on July 11, 2023, in *State v. Mitch Michael Curtis, Jr.*, Kootenai County Case No. CRF 2014 18896, where the defendant Curtis in that case was represented by Jonathan Williams, a deputy public defender (referring back to a case decided on June 26, 2023, in *State v. Alyssa Duncan*, Kootenai County Case No. CR28-23-3250, where the defendant Duncan was represented by yet a different deputy public defender):

> Duncan's counsel [a different public defender than Jonathan Williams] writes, "The basis for such argument consist of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his [her] future.' I.C.R. 35(b) Mot. 2. That phrase tells the Court not one thing. Such phrase is not any new evidence at all. It is really a throw away line that is currently being used in most I.C.R. 35(b) Motions, whether from the Kootenai County Public Defender's Office or from other counsel. As an example, this Court in *State v. Brandon Louis Rice*, CR28-21-13988,

> in this Court's Memorandum Decision and Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, filed in that case on June 12, 2023, this Court noted that defense counsel in that case gave the argument, "The basis for this Motion consists of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his future." Mem. Decision and Order 3. The attorney quoted in that decision who wrote essentially verbatim sentence, was not from the Kootenai County Public Defender's Office.

Duncan, Mem. Decision and Order 2-4. The "direct and collateral negative impact" argument has been a worn out phrase used in nearly every I.C.R. 35(b) motion filed before this Court for quite some time. While not only thread-bare, the argument comprises no new evidence, which is what is needed by Martinez at this I.C.R. 35 juncture. Martinez has provided no new evidence.

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

On July 23, 2019, Senior District Judge John Luster, filling in for District Judge Rich Christiansen, sentenced Martinez in CR28-19-9991, and utilized a presentence report from a prior felony conviction in Kootenai County Case No. CR2017-10326. Judge Luster sentenced Martinez to two years fixed followed by two years indeterminate for a total unified sentence of four years for the felony crime of possession of a controlled substance, heroin, but suspended that prison sentence and placed Martinez on supervised probation, with the specific term that Martinez enter into and successfully complete the Kootenai County Mental Health Court program. Order Suspending Execution of Judgment and Sentence 3. On November 30, 2021, Martinez committed her new crimes in CR28-21-20050. On December 20, 2021, Martinez pled guilty to reduced charges in CR28-21-20050, and this Court revoked Martinez' probation in CR28-19-9991 and sent Martinez on a period of retained jurisdiction. On September 1, 2022, at the end of that period of retained jurisdiction, this Court placed Martinez back on supervised probation and ordered her to re-apply to Mental Health Court. Martinez did

apply to Mental Health Court but was found to be not eligible.

On April 25, 2023, Martinez violated her probation as follows: "Ms. Martinez attempted to conceal or destroy evidence by eating around ten (10) fentanyl pills in the Kootenai County Jail after she remove them from her vagina (see attached report from Deputy Clark)." Report of Violation "run" on May 2, 2023, 1. Martinez was charged with felony Possession of a Controlled Substance, Fentanyl, and felony Unlawful Possession of Contraband in a Correctional Facility, and misdemeanor possession of paraphernalia. *Id.* at 2. Those new charges were filed in CR28-23-7357. On May 16, 2023, Martinez admitted violating her probation by committing the felony crime Possession of a Controlled Substance, Fentanyl, and the plaintiff dismissed the Unlawful Possession of Contraband in a Correctional Facility and paraphernalia charges. Even though the major contraband charge was dismissed as part of a plea agreement, the evidence is compelling:

> At 2256 hours, KCSO called to report during their body scan of Martinez, they located additional contraband concealed inside of her. Deputy Clark #2246 state a small container was concealed inside of Martinez was located. The container had multiple fentanyl pills. When Martinez had removed the bottle from herself, she attempted to ingest the fentanyl pills before deputies could collect the pills as evidence. Martinez eventually spit out the pills and they were collected as evidence.

CR28-23-7357, Affidavit in Support of Probable Cause, 4 Also on May 16, 2023, Martinez admitted violating her probation in CR28-21-20050 and CR28-20-2118, two misdemeanor cases. On July 24, 2023, this Court sent Martinez on a retained jurisdiction in both of her felony cases, CR28-19-9991 and CR28-23-7357.

It is worth noting that in CR28-20-2118, which took nearly two years to resolve, at Martinez' December 20, 2021, sentencing hearing for misdemeanor inattentive driving, it Martinez claimed on January 7, 2020, she was having a "sneezing fit" when she lost control of her vehicle while eastbound on Interstate 90, Martinez struck a guardrail on her

right, bounced off went across two lanes of traffic, into the median, and struck a vehicle travelling the opposite direction, severely injuring her victim, Maria Simicina. Affidavit in Support of Warrantless Arrest 1, CR28-20-2118. The investigating officer found "Based on my training and experience, the evidence appeared inconsistent with someone having just a 'Sneezing fit.'" *Id.* at 2. At sentencing on December 20, 2021, this court stated the "Only evidence is that you were driving like a bat out of hell and you slumped over the wheel and you ruined [Maria Simicina's] life. Whether or not you were high at the time, can't be proven, you were driving like a bat out of hell."

It is also worth noting that in Kootenai County Case No. CR2017-10326, on August 2, 2017, Martinez pled guilty to Possession of a Controlled Substance (Heroin) With the Intent to Deliver. This was pursuant to I.C.R. 11, for a one year fixed prison sentence, imposed. Pretrial Settlement Offer 1. Judge Christensen agreed to be bound by such agreement and sentenced Martinez on September 21, 2017, to one year fixed and two years indeterminate and imposed that prison sentence. Judgment and Sentence 1-2.

It is also worth noting that before she committed her 2017 felony possession with the intent to deliver charge for which she was sent to prison, she had a relatively extensive juvenile record from 2010 to 2012, then three felony convictions in 2013 for possession of a stolen vehicle, possession of a controlled substance (two counts), driving under the influence and possession of stolen property (Garfield County Washington). CR28-23-7357 Presentence Report, 12.

Given the disturbing facts of felony crime in CR28-23-7357, the injury she caused her victim in CR28-20-2118, her lengthy criminal record, her failure at treatment efforts such as Mental Health Court, and her numerous probation violations, a reduction in Martinez' sentences (which would be the result of switching from consecutive to concurrent sentences) is not warranted. Nothing has been presented by Martinez to

persuade this Court to further reduce her sentences.

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

Martinez' request to essentially reconsider its earlier decision without any new evidence or argument is unavailing. The Idaho Court of Appeals found a similar argument unavailing. In *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986), Anderson filed an I.C.R. 35(b) motion in which he did not argue the severity of the sentence when imposed, but rather argued prison presented a "lack of rehabilitation programs, overcrowding and violence and his severe pain and discomfort due to the lack of proper medical treatment in prison as reasons to reduce his sentence." 111 Idaho at 123, 721 P.2d at 223. In affirming the district court's denial of Anderson's I.C.R. 35(b) Motion, the Idaho Court of Appeals held:

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

Id. This Court specifically finds that further reducing Martinez' sentence to a concurrent sentence in CR28-23-7357 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.* There is nothing about Martinez' decisions over the past several years that would cause the Court to think for one second that a further reduction in Martinez' sentence in CR28-23-7357 (by running her sentence concurrent with the sentence imposed in CR28-19-1991) would be warranted. Such decision to further reduce Martinez' sentence would be anathema with this Court's paramount duty to protect the public.

III. ORDER.

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

NOTICE OF RIGHT TO APPEAL

YOU, JANELL MARIE MARTINEZ, 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 5th day of September, 2023.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of September, 2023 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Prosecuting Attorney – Stan Mortensen kcpaicourtseservice.com
Defense Attorney – Lisa Chesebro schwartzlawoffice@gmail.com
Idaho Department of Correction centralrecordsservice.com
Records Division (certified copy)
~~Fax: (208) 327-7445~~
JANELL MARIE MARTINEZ
IDOC # 114568

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____, Deputy