STATE OF IDAHO)
County of KOOTENAI) ss
FILED 02/28/2024
AT 1:30 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.

MCKENZIE NICOLE JOHNSTON
DOB: 11/02/1996
SSN: XXX-XX-4816
IDOC: 136421

Defendant.

Case No. **CR28-19-18915**

MEMORANDUM DECISION AND ORDER DENYING MOTION FOR MODIFICATION OF SENTENCE PURSUANT TO I.C.R. 35(b), AND ORDER FOR STATEMENT FROM DEFENDANT, AND NOTICE OF RIGHT TO APPEAL

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On February 15, 2024, as a result of a Motion for Termination from Mental Health Court filed on February 1, 2024, this Court imposed McKenzie Nicole Johnston's (Johnston) sentence as follows:

OPERATING A MOTOR VEHICLE WITHOUT THE OWNER'S CONSENT, I.C. 49-227, committed on October 16, 2019;	To the custody of the State of Idaho Board of Correction for a fixed sentence of TWO (2) years followed by an indeterminate term of TWO (2) years for a total unified sentence of FOUR (4) years.

February 15, 2024, Probation Violation Disposition 1-2. The Court retained jurisdiction pursuant to Idaho Code § 19-2601. *Id.* at 2. On February 27, 2024, Johnston, through her 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). Johnston, through counsel, states: "This motion is made as a plea for leniency." I.C.R. 35(b) Mot. 1. Counsel for Johnston claims the motion is "supported by a CDA 2/ASAM assessment from Dragonfly Support Services that will be provided at hearing." *Id.* Counsel for Johnston also claims: The basis for

such argument consists of the direct and collateral negative impact a disposition of the current nature places upon the defendant and his [her' future." *Id.* at 2. As discussed below, this is the apparent obligatory language used by the Office of the Kootenai County Public Defender, and the sentence "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", tells this Court absolutely nothing. The relief Johnston apparently seeks is "placing her back on probation with the requirement to reapply for and successfully complete the Kootenai County Mental [Health] Court Program. *Id.* Counsel for Johnston then claims, "Additional evidence will include testimony from the defendant and documentation from Dragonfly Support Services, a CDA w/ASAM assessment, in support of the defendant's request. *Id.* at 3. Counsel for Johnston requested a hearing before the Court on her I.C.R. 35(b) Motion. *Id.* This Court finds Johnston's I.C.R. 35(b) motion must be denied without a hearing for the following reasons.

II. ANALYSIS.

A. JOHNSTON'S I.C.R. 35 MOTION MUST BE DENIED BECAUSE JOHNSTON 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, Johnston 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 Johnston could have presented at a hearing in support of her Rule 35 Motion. Because Johnston 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. Johnston's 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 February 15, 2024, probation violation hearing (hearing on Motion to Terminate from Mental Health Court), 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.
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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*, Johnston's request for supervised probation is not based on any "new" evidence. There is no CDA (the Court assumes this acronym is for a chemical dependency assessment, but even

that is not specified by counsel for Johnston) "w/ASAM assessment" attached to Johnston's I.C.R. 35(b) Motion. Thus, the motion is filed without any attached evidence, and, apparently, the motion was filed before counsel for Johnston knew what that evidence *might* consist of. Does it recommend Level III.5 treatment, does it recommend Level I treatment, does it recommend no treatment, does it say what Johnston's drug of choice is? We don't know the answers to any of those questions because no evidence was attached to Johnston's I.C.R. 35(b) Motion. Furthermore, even if a "CDA w/ASAM assessment" were attached to Johnston's I.C.R. 35(b) Motion, her motion would not be supported by any new ***relevant*** evidence. This is so because no matter what level of chemical dependency treatment Johnston might be assessed as currently needing, it will not be relevant. Johnston was sent on a period of retained jurisdiction because of the threat to the public Johnston poses. She is charged with a new crime, driving under the influence. At her February 15, 2024, hearing, the Court specifically told Johnston, "What you did on January 20, 2024, causes public safety concerns." February 15, 2024, munites at 10:25:31-10:44:32. The Court specifically told Johnston that even though she had been accepted into the Walker Center for inpatient treatment (without an evaluation), the Court was unwilling to utilize that option because ,"You can walk away from the Walker Center. Retained Jurisdiction is a better fit for you." *Id.* Finally, and perhaps most importantly, Johnston's argument for supervised probation is not related to any of the *Toohill* factors (discussed in more detail in the next section). Essentially, Johnston is simply arguing the Court to reconsider its decision, without any new evidence, any new relevant evidence, or even any new argument being made to this Court.

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 Johnston's I.C.R. 35(b) motion presents no new information, and no new relevant information. Accordingly, under *Smith*, Johnston'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. Johnston's doing so is not reasonable.

The Idaho Court of Appeals concluded in *Smith*:

> Alternatively, Smith argues that the district court abused its discretion in denying his Rule 35 motion on the merits. A motion for reduction of sentence under Rule 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *Huffman*, 144 Idaho at 203, 159 P.3d at 840.
>
> As discussed above, the information Smith provided in support of his Rule 35 motion was information that was already in his possession and already considered by the district court in imposing Smith's sentence. Because Smith provided the district court with no new or additional information to support finding Smith's sentence excessive, we conclude no abuse of discretion has been shown. Therefore, the district court's order denying Smith's Rule 35 motion is affirmed.

161 Idaho at 165-66, 384 P.3d at 412-13. Johnston has presented this Court with no new evidence. That failure alone is reason for this Court to deny Johnston's I.C.R. 35(b) Motion without holding a hearing.

As mentioned above, Johnston's 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 Johnston at this I.C.R. 35

juncture. Johnston has provided no new evidence.

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

This Court specifically finds that releasing Johnston back 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.

C. JOHNSTON IS ORDERED TO FILE HER DECISION AS TO WHETHER SHE WISHES TO COMPLETE HER RETAINED JURISDICITON.

Abundantly clear from Johnston's I.C.R. 35(b) Motion, is the fact that Johnston does not wish to perform her period of retained jurisdiction. A retained jurisdiction is apparently not to Johnston's liking. If that is the case, there is no sense burdening the Idaho taxpayer for the cost of Johnston's retained jurisdiction, and there is no sense putting Johnston through this programming unnecessarily. At any time, this Court can relinquish jurisdiction on Johnston, and impose her prison sentence. This Court can do so without having a hearing.

Due to the filing of Johnston's I.C.R. 35(b) Motion, especially doing so without any evidence to support such, and given her apparent dislike for this Court's decision to utilize a retained jurisdiction, the Court is inclined to relinquish jurisdiction at the present time. In an abundance of caution, the Court will let Johnston weigh in on her thoughts on what the "direct and collateral negative impact" of the imposition of her prison sentence might be.

If this Court is not presented with Johnston's statement that she wishes to complete her period if retained jurisdiction, filed with the Court by 5:00 p.m. on Monday, March 4, 2024, this Court will enter an order relinquishing its jurisdiction on Johnston and impose her prison sentence at that time.

III. ORDER.

IT IS HEREBY ORDERED that defendant **MCKENZIE NICOLE JOHNSTON'** I.C.R. 35(b) motion is **DENIED** for the reasons set forth above: Johnston has submitted no new evidence. Johnston's motion is devoid of any merit and is frivolous.

IT IS FURTHER ORDERED that defendant **MCKENZIE NICOLE JOHNSTON,** through her attorney, file with this Court by 5:00 p.m. on Monday, March 4, 2024, her statement that she wishes to complete her period of retained jurisdiction, or this Court will enter its order relinquishing its jurisdiction on Johnston at that time.

NOTICE OF RIGHT TO APPEAL

YOU, MCKENZIE NICOLE JOHNSTON, 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 28th day of February, 2024.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of February, 2024 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Prosecuting Attorney – Stan Mortensen kcpaicourts
Defense Attorney – Paul Szott pdfax@kcgov.us
centralrecords@idoc.idaho.gov
MCKENZIE NICOLE JOHNSTON
IDOC # 136421

~~Idaho Department of Correction~~
~~Records Division~~ (certified copy)
~~Fax: (208) 327-7445~~

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____, Deputy