

CR28-21-7299 - POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE), (a felony), I.C. § 37-2732(c)(1), committed on April 26, 2021.

To the custody of the Idaho State Board of Correction for a fixed term of THREE (3) years followed by an indeterminate term of FOUR (4) years, for a total term not to exceed SEVEN (7) years.

November 15, 2023, Judgment and Sentence and Notice of Right to Appeal, 2. On March 7, 2024, Elder, through counsel, in CR28-23-16368, 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). Elder, through counsel, states: “This motion is made as a plea for leniency.” I.C.R. 35(b) Mot. 1. Elder apparently requests all his sentences be modified so that only three years fixed be imposed, followed by four years indeterminate: “The pleading supports a request to modify Robert Nobel Elder’s sentence to a fixed period of 3 years, to be followed by an indeterminate period of 4 years.” *Id.* at 3. (underlining in original). Elder has not filed an I.C.R. 35 Motion in CR28-21-7299. Counsel for Elder claims: “Additional evidence will likely include testimony from the defendant, testimony from IDOC medical personnel, and documentation of defendant’s current health status in support of the defendant’s request.” *Id.* at 3. Counsel for Elder further claims:

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, specifically that defendant cannot receive adequate treatment for his cancer diagnosis based on the length and structure of his imposed prison sentence and based on the advanced stages of his cancer, defendant anticipates likely dying while in custody under the current terms of his sentence.

Id. at 2-3. Counsel for Elder requested a hearing before the Court on his I.C.R. 35(b) Motion. *Id.* at 3. This Court finds Elder’s I.C.R. 35(b) motion must be denied without a hearing for the following reasons.

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II. ANALYSIS.

A. ELDER'S I.C.R. 35 MOTION MUST BE DENIED BECAUSE ELDER 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.2d 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, Elder 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 Elder could have presented at a hearing in support of his Rule 35 Motion. Because Elder 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. Elder’s desire for a shortened prison sentence is not supported by any relevant, admissible, new evidence.

Without presenting any new explanation as to why this Court was incorrect in imposing Elder’s prison sentences at the November 15, 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 shorter sentence.

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 *Campbell* and *Huffman*, Elder's request for a reduced sentence is not based on any “new” evidence. Most importantly, the argument for a reduced prison sentence is not related to any of the *Toohill* factors. Essentially, Elder 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 Elder's I.C.R. 35(b) motion presents no new information, and no new relevant information.

Accordingly, under *Smith*, Elder'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. Elder'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. Elder has presented this Court with no new evidence. That failure alone is reason for this Court to deny Elder's I.C.R. 35(b) Motion, without holding a hearing.

At first blush, Elder's I.C.R. 35 Motion in CR28-23-16368 discusses "additional" evidence, but none of it is "new" evidence, and none of it is "relevant" evidence. As mentioned above, counsel for Elder claims, "Additional evidence will likely include testimony from the defendant, testimony from IDOC medical personnel, and documentation of defendant's current health status 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 assertion by Elder's attorney that "additional evidence" will "likely" include

testimony from the defendant, IDOC medical personnel, and documentation of the defendant's current health status, does not amount to new evidence, as Elder had informed this Court at the sentencing hearing that he had cancer. November 15, 2023, Ct. Min. 1. "Likely" "additional testimony" informing the Court of the defendant's medical diagnosis would not be **new** or **relevant** evidence. Elder has provided no new evidence.

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

This Court utilized a presentence report dated August 18, 2021, which was previously prepared for CR28-21-7299. This presentence report shows multiple criminal offenses committed by Elder over the previous thirty years. While on felony probation for the most recent offence listed, in case CR28-21-7299, Elder was charged with new felony crimes in CR28-23-16368. These most recent charges in CR28-23-16368 included possession of a controlled substance with the intent to deliver, something for which Elder had not previously been charged. Elder is committing more serious offense even though on felony probation. This most serious offense was committed after this Court had previously retained jurisdiction in CR28-21-7299.

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

Elder's 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 shortening Elder’s prison 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). 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.

Finally, the relief sought by Elder does not logically track his alleged concerns about a lack of cancer treatment while in prison. Elder, in his I.C.R. 35 Motion does not seek any reduction in the fixed portion of his prison sentence, he only seeks a reduction

seek any reduction in the fixed portion of his prison sentence, he only seeks a reduction in the indeterminate portion of this trafficking sentence, requesting a reduction from twelve years indeterminate to four years. If Elder were truly concerned about poor medical treatment while in prison, one would think he would have requested a reduction in his fixed sentences.

III. ORDER.

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

NOTICE OF RIGHT TO APPEAL

YOU, ROBERT NOBEL ELDER, 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 21th day of March, 2024.


John T. Mitchell, District Judge

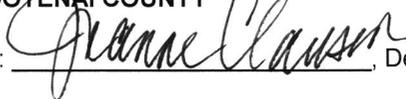
CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of March, 2024 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Prosecuting Attorney – Donna Gardner *ncpaicou@sechegov*
Defense Attorney – Jonathan Williams *pd@sechegov.us*

Idaho Department of Correction
Records Division (certified copy)
Fax: (208) 327-7445 *centralrecords@idoc.idaho.gov*
CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

ROBERT NOBEL ELDER
IDOC # 82148

BY: , Deputy