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## State v. Kerr Appellant's Reply Brief Dckt. 44368

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ERIC D. FREDERICKSEN  
State Appellate Public Defender  
I.S.B. #6555

BEN P. MCGREEVY  
Deputy State Appellate Public Defender  
I.S.B. #8712  
322 E. Front Street, Suite 570  
Boise, Idaho 83702  
Phone: (208) 334-2712  
Fax: (208) 334-2985

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 44368 & 44369
	)	
v.	)	TWIN FALLS COUNTY NOS.
	)	CR42-15-6700 & CR42-15-9906
JAMES MICHAEL KERR,	)	
	)	APPELLANT'S
Defendant-Appellant.	)	REPLY BRIEF
_____	)	

STATEMENT OF THE CASE

Nature of the Case

In two separate cases, James Michael Kerr pleaded guilty to possession of a controlled substance. In each case, the district court imposed a concurrent unified sentence of six years, with two years fixed, and retained jurisdiction. After Mr. Kerr participated in an "extended rider," rider program staff recommended the district court relinquish jurisdiction. The district court then relinquished jurisdiction in both cases. In each case, Mr. Kerr filed an Idaho Criminal Rule 35 ("Rule 35") motion for a reduction of sentence. The district court denied Mr. Kerr's Rule 35 motions. Mr. Kerr appealed,

asserting in a consolidated appeal the district court abused its discretion in both cases when it denied his Rule 35 motions.

In its Respondent's Brief, the State argued the district court acted within its discretion when it denied the Rule 35 motions, because Mr. Kerr did not present new information in support of the Rule 35 motions and he did not demonstrate any rehabilitative progress during his rider. (See Resp. Br., pp.2-3.)

This Reply Brief is necessary to address the State's contention that Mr. Kerr provided no new information in support of his Rule 35 motions. Mr. Kerr asserts that even if he had not provided any new information in support of his Rule 35 motions, he submitted additional information that provides a basis for this Court to find that the denial of the Rule 35 motions was an abuse of discretion. While Mr. Kerr challenges the State's argument the district court did not abuse its discretion when it denied his Rule 35 motions, he relies on the arguments presented in his Appellant's Brief and will not repeat those arguments here.

#### Statement of Facts and Course of Proceedings

The Statement of Facts and Course of Proceedings were previously articulated in Mr. Kerr's Appellant's Brief, and are incorporated herein by reference thereto.

## ISSUE

Did the district court abuse its discretion in both cases when it denied Mr. Kerr's Idaho Criminal Rule 35 Motions for a Reduction of Sentence?

## ARGUMENT

### The District Court Abused Its Discretion In Both Cases When It Denied Mr. Kerr's Idaho Criminal Rule 35 Motions For A Reduction Of Sentence

Mr. Kerr asserts that the district court abused its discretion in both cases when it denied his Idaho Criminal Rule 35 motions for a reduction of sentence. In support of the Rule 35 motions, Mr. Kerr presented new and additional information on how he suffered from mental health issues such as schizophrenia and a learning disability, he was not given appropriate accommodations on the rider, and he was not given a consistent counselor while participating in the rider program. (See R, pp.156-57, 278-79.)

The State argues the district court "was aware at the time of sentencing that [Mr.] Kerr has mental health issues and, as such, this was not new information entitling [Mr.] Kerr to a reduction of his sentence." (Resp. Br., p.3.)

As the State correctly notes (Resp. Br., p.2), the Idaho Supreme Court has held that "[w]hen 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 Rule 35 motion." *State v. Huffman*, 144 Idaho 201, 203 (2007). "An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information." *Id.*

Mr. Kerr asserts that, even assuming (without conceding) he did not provide any new information in support of his Rule 35 motions, he nonetheless has provided a basis for this Court to find that the denial of his Rule 35 motion was an abuse of discretion. At

the least, the information presented in support of the Rule 35 motion on Mr. Kerr's mental health issues and experiences during the rider (see *generally* R, pp.156-57, 278-79), was additional information as contemplated by *Huffman*.

Mr. Kerr submits the State is incorrect in arguing that "new information" serves as the only basis for reversal of the denial of a Rule 35 motion. As discussed above, "[w]hen 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 Rule 35 motion." *Huffman*, 144 Idaho at 203. While the Idaho Supreme Court stated in *Huffman* that "[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information," *id.*, the Court has indicated that additional information also serves as a basis for an appellate court to find that a denial of a Rule 35 motion was an abuse of discretion.

For example, in *State v. Adair*, 145 Idaho 514 (2008), the Idaho Supreme Court, citing *Huffman*, stated that, "absent the presentation of new evidence, an appeal from a Rule 35 motion merely asks this Court to review the underlying sentence. Without additional information being presented, there is no basis for this Court to find that the denial of the Rule 35 motion was an abuse of discretion." *Adair*, 145 Idaho at 517 (citation omitted). The *Adair* Court, because "[n]o additional information was provided to the trial court to indicate that the sentence was excessive," decided that "[t]he trial court operated without its discretion when it denied [the defendant's] Rule 35 motion for reduction of sentence." *Id.*

Because the Idaho Supreme Court in *Huffman* and *Adair* recognized “additional information” (alongside “new information”) as a way to show that a sentence is excessive in support of a Rule 35 motion, *Huffman*, 144 Idaho at 203, *Adair*, 145 Idaho at 517, Mr. Kerr submits that additional information serves as a basis for an appellate court to find that a district court’s denial of a Rule 35 motion was an abuse of discretion. Thus, because Mr. Kerr presented additional information in support of his Rule 35 motions, he has provided a basis for this Court to find that the denial of the motions was an abuse of discretion.

The State also argues that the district court acted well within its discretion when it denied Mr. Kerr’s Rule 35 motions, because Mr. Kerr did not demonstrate any rehabilitative progress during his rider. (See Resp. Br., p.3.) Mr. Kerr submits the district court abused its discretion when it denied the Rule 35 motions, for the reasons contained in the Appellant’s Brief and incorporated herein by reference thereto. (App. Br., pp.6-7.)

### CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant’s Brief, Mr. Kerr respectfully requests that this Court reduce his sentences in both cases as it deems appropriate.

DATED this 24<sup>th</sup> day of January, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24<sup>th</sup> day of January, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JAMES MICHAEL KERR  
INMATE #116912  
SICI  
PO BOX 8509  
BOISE ID 83707

RANDY J STOKER  
DISTRCT COURT JUDGE  
E-MAILED BRIEF

ALAN J BOEHME  
ATTORNEY AT LAW  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BPM/eas