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State v. Searcy Respondent's Brief Dckt. 44487

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STATEMENT OF THE CASE

Nature Of The Case

Barryngton Eugene Searcy appeals from the district court's order denying his Rule 35 motion to correct an allegedly illegal sentence and denying his motion for court-appointed counsel.

Statement Of The Facts And Course Of The Proceedings

The factual background of this case, as set forth by the Idaho Supreme Court in Searcy's first appeal, is as follows:

Barry Searcy was convicted of killing Teresa Rice while robbing Jack's Grocery Store in Ashton, Idaho, July 15, 1987. Rice, the mother of two children, owned and operated the store with her husband Michael. Searcy robbed the store in order to get money to buy cocaine. Searcy had staked out the store during its operating hours and hid on top of some coolers in the back room where he waited to either burglarize or rob as the situation dictated. From this hiding spot Searcy could see Rice enter the back room and count out money for storage in the store's safe. Rice then left the back room.

As Searcy was leaving his hiding spot Rice returned to the back room and discovered Searcy. A confrontation ensued and Rice was shot in the stomach by Searcy, apparently during a struggle. Searcy testified that he then told Rice that if she opened the safe he would call an ambulance. She did so. Searcy then removed the money from the safe and placed it into his backpack.

Searcy did not call an ambulance. Rather, he put his rifle to Rice's head and shot her, killing her instantly.

After leaving the store, Searcy testified that he hid the rifle and money under a rock at a target shooting location near Rexburg, Idaho. The next day Searcy took some of the money and bought a used car with it in order to drive to Salt Lake City, Utah, to purchase more cocaine. On September 13, 1987, some boys discovered the gun, money and Searcy's gloves. The boys showed the items to their fathers who were target

shooting nearby. Discovery of these items lead [sic] to the arrest of Searcy.

State v. Searcy, 118 Idaho 632, 633-34, 798 P.2d 914, 915-16 (1990) (Searcy I). Following a jury trial, Searcy was convicted of first degree murder and robbery, and of an enhancement for using a firearm in the commission of those offenses. Id. at 634, 798 P.2d at 916. The district court entered judgment against Searcy and sentenced him to a fixed life sentence for the first degree murder, a consecutive indeterminate life sentence with ten years fixed for the robbery, and then increased each sentence by an additional ten years for the enhancement. Id.

Searcy appealed, contending that the lack of an insanity defense violated his constitutional rights, that the court erred when it denied a motion to strike the victim impact statements, and that the court abused its sentencing discretion. Id. at 636-37, 798 P.2d at 918-19. The Idaho Supreme Court affirmed Searcy's convictions and underlying sentences for first degree murder and robbery, but vacated the dual enhancements and remanded the case for the court to correct the sentence in Searcy's presence by applying only a single enhancement for the use of a firearm. Id. at 638-39, 798 P.2d at 920-21.

The following year, Searcy raised two arguments to again challenge the lack of an insanity defense on appeal. State v. Searcy, 120 Idaho 882, 883, 820 P.2d 1239, 1240 (Ct. App. 1991) (Searcy II). In a *per curiam* opinion, the Court of Appeals held that the first argument had already been specifically addressed by the Idaho Supreme Court and that the second could have been raised in Searcy's prior appeal. Id. The Court of Appeals declined to entertain Searcy's appellate challenges and affirmed his amended judgment of conviction and sentences. Id.

The following year, Searcy's case came before the Court of Appeals again on an appeal from his sentences. State v. Searcy, 124 Idaho 107, 108, 856 P.2d 897, 898 (Ct. App. 1992) (Searcy III). After remittitur entered in Searcy's first appeal, the district judge brought Searcy back to court where it pronounced the corrected sentence in Searcy's presence, limiting the enhancement to Searcy's robbery conviction. Id. at 109, 856 P.2d at 899. Later, the district court filed an amended judgment setting forth the corrected sentence, which Searcy then challenged under Idaho Criminal Rule 35, alleging that the written judgment did not conform to the court's oral pronouncements. Id. at 109-10, 856 P.2d at 899-900. A new district judge reviewed Searcy's motion and then further corrected the sentence by making the enhancement a nullity, merging it into the fixed ten-year portion of the robbery sentence. Id. at 110-11, 856 P.2d at 900-01.

On appeal, after concluding that the first judge's amended sentence was correct and the second judge's resentencing of Searcy was not necessary, the Court of Appeals directed "the district court to further amend the judgment of conviction for the robbery ... to state that the enhanced portion of the sentence for that crime, imposed for the use of a firearm in committing the offense, is for an indeterminate term of ten years and shall be served as an extension of the indeterminate life sentence imposed upon the robbery conviction," so reinstating the court's original corrected sentence. Id. at 113, 856 P.2d at 903. Thereafter, the district court amended the sentence as directed by the Court. (R., pp.389-91.) As modified, the Court of Appeals affirmed Searcy's sentences. Searcy III, 124 Idaho at 113, 856 P.2d at 903.

In 2016, Searcy filed a successive Rule 35 motion to correct his allegedly illegal sentence (R., pp.15-38); a request for court-appointed counsel to pursue that motion

(R., pp.327-29); and a Rule 36 motion to correct the misspelling of his name in the court's amended judgment of conviction (R., pp.323-24). The district court granted Searcy's motion to correct the clerical error and, determining that Searcy's sentence was legal on its face, denied his Rule 35 motion and request for court-appointed counsel. (R., pp.337-52.) Searcy filed a timely notice of appeal. (R., pp.354-56.)

ISSUES

Searcy's statement of the issues presented on appeal is found at page 7 of his Appellant's brief and is lengthy. The state consolidates and rephrases the issues on appeal as:

1. Has Searcy failed to show that the district court erred when it denied his Rule 35 motion to correct an allegedly illegal sentence?
2. Has Searcy failed to show that the district court abused its discretion when it denied his motion for appointed counsel to pursue his meritless Rule 35 motion?

ARGUMENT

I.

Searcy Has Failed To Show That The District Court Erred When It Denied His Rule 35 Motion To Correct An Allegedly Illegal Sentence

A. Introduction

Below, Searcy filed a successive Rule 35 motion to correct his allegedly illegal sentence, raising several claims. (R., pp.15-38.) The district court addressed the merits of each of these claims and denied the motion. (R., pp.342-52.) On appeal, Searcy argues that the district court erred when it denied his Rule 35 motion. (Appellant's brief, pp.9-40.) Application of the correct legal standards, however, shows that the district court correctly denied the motion.

B. Standard Of Review

Whether a sentence is illegal is a question of law that is freely reviewed by the court on appeal. State v. Clements, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009).

C. Searcy Has Failed To Show That His Sentence Is Illegal

Idaho Criminal Rule 35 is a narrow rule that allows a trial court to correct at any time a sentence that is illegal from the face of the record. I.C.R. 35(a); Clements, 148 Idaho at 84, 218 P.3d at 1145. Rule 35 is not a vehicle designed to re-examine the facts underlying the case to determine whether a sentence is illegal; rather, the rule only applies to a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. Clements, 148 Idaho at 84, 218 P.3d at 1145. An illegal sentence under Rule 35 is one in excess of a statutory provision or otherwise contrary to applicable law. State v. Alsanea, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App.

2003). Applying these correct legal standards, Searcy has failed to show that his sentence is illegal.

In 1988, Searcy was convicted of first degree murder, I.C. §§ 18-4001, 4003; and robbery, I.C. § 18-6501; enhanced by his use of a firearm in the commission of those crimes, I.C. § 19-2520. State v. Searcy, 118 Idaho 632, 633, 798 P.2d 914, 915 (1990) (Searcy I). At the time of Searcy's conviction, first degree murder was punishable by death or by imprisonment for life, I.C. § 18-4004; robbery was punishable by imprisonment for up to life, I.C. § 18-6503; and the weapons enhancement allowed the court to increase the time of imprisonment by up to an additional fifteen years, I.C. § 19-2520. Following his several appeals, Searcy was ultimately sentenced to a fixed term of life for the first degree murder, and a consecutive sentence of up to life with ten years fixed for the robbery, with an additional ten-year enhancement for his use of the firearm. (R., pp.387-91.) On its face, that sentence does not exceed the statutory provisions, nor is it otherwise contrary to applicable law. Searcy, therefore, cannot show that his sentence is illegal and the district court correctly denied his Rule 35 motion.

Of course, as recognized by the district court, Searcy's current challenges were not really to the legality of his sentence. Rather, the challenges he raised—whether the court had considered and found aggravating factors before imposing a life sentence on his conviction for first degree murder, whether it found that premeditated murder and robbery were separate crimes, and other alleged instructional errors—are challenges to alleged errors occurring at trial or before the imposition of the sentence, not to the sentence itself. As this Court has previously noted, such challenges are not properly raised in a Rule 35 motion. See State v. Wolfe, 158 Idaho 55, 65, 343 P.3d 497, 507

(2015) (citing Clements, 148 Idaho at 85, 218 P.3d at 1146). The district court therefore correctly denied Searcy's Rule 35 motion and should be affirmed.

On appeal, Searcy first argues that the district court committed procedural errors when denying his most recent Rule 35 motion. (Appellant's brief, pp.9-11.) He appears to contend that the district court erred by not considering the merits of his illegal sentence claims and instead denying them on the basis of *res judicata*. (Id.) This argument fails on two grounds. First, the district court in fact addressed the relative merits of Searcy's claims, and correctly denied them. (See R., pp.343-50.) Second, notwithstanding Searcy's argument on appeal (Appellant's brief, pp.10-11), the doctrine of *res judicata* is broader than he contends.

The question of whether an action is barred by the doctrine of *res judicata* is a question of law over which an appellate court exercises free review. State v. Rhoades, 134 Idaho 862, 11 P.3d 481 (2000). The doctrine of *res judicata* prevents re-litigation of issues that have been previously decided in a final judgment or decision in an action between the same litigants. Rhoades, 134 Idaho at 863, 11 P.3d at 482. Similarly, claims which could have been raised to the Court previously but were not are barred in subsequent litigation by the principles of *res judicata*. Aragon v. State, 114 Idaho 758, 766, 760 P.2d 1174, 1182 (1988). As noted above, despite Searcy's insistence to the contrary, he is challenging his conviction, not his sentence. Because the issue of the lawfulness of Searcy's conviction has been raised to and decided by both the Idaho Supreme Court and Court of Appeals previously—even if Searcy's current *arguments* in relation to that issue were not—those arguments are barred under the doctrine of *res judicata* and are not properly brought before this Court. Moreover, even where Searcy

challenges the legality of his sentence, that issue too has been raised and decided by the Court multiple times and subsequent challenges would be properly denied under the doctrine of *res judicata*.

Searcy next argues that his conviction for first degree murder was obtained through an unconstitutional presumption contained in the jury instructions. (Appellant's brief, pp.12-29.) As noted above, because this issue would require examining the underlying facts and reviewing Searcy's trial for potential errors, it is not a proper issue for a Rule 35 motion. See Wolfe, 158 Idaho at 65, 343 P.3d at 507 (citing Clements, 148 Idaho at 85, 218 P.3d at 1146). This is in fact a challenge to Searcy's conviction, and while Rule 35(a) allows a court to correct an illegal *sentence* at any time, it is not a mechanism to challenge an underlying judgment of conviction. See State v. Warren, 135 Idaho 836, 841-42, 25 P.3d 859, 864-65 (Ct. App. 2001). "Absent a statute or rule extending its jurisdiction, the trial court's jurisdiction to amend or set aside a judgment expires once the judgment becomes final, either by expiration of the time for appeal or affirmance of the judgment on appeal." State v. Jakoski, 139 Idaho 352, 355, 79 P.3d 711, 714 (2003). Searcy's judgment of conviction for first degree murder has long since become final, and the district court was correct that it lacked jurisdiction to even consider this issue. (See R., pp.348-49.)

Third, Searcy argues that his consecutive sentences for first degree murder and robbery are illegal, alleging that the jury determined that the murder occurred in the course of the robbery. (Appellant's brief, pp.29-32.) Like Searcy's other arguments, this issue would require factual inquiries to resolve and so is not properly brought through a Rule 35 motion. See Wolfe, 158 Idaho at 65, 343 P.3d at 507 (citing

Clements, 148 Idaho at 85, 218 P.3d at 1146). The district court, however, addressed this claim of error on its merits in its thorough “Memorandum Decision On Defendant’s Pending Motions” (R., pp.337-52), a copy of which is attached as “Appendix A.” The state adopts as part of its argument on appeal the district court’s analysis contained at pages 10-12 of its order.

Fourth, Searcy argues that his fixed life sentence for first degree murder was illegal because, he alleges, the district court failed to find certain required aggravating factors before imposing the sentence. (Appellant’s brief, pp.33-37.) As with Searcy’s above arguments, this issue would require factual inquiries to resolve and so is not properly brought through a Rule 35 motion. See Wolfe, 158 Idaho at 65, 343 P.3d at 507 (citing Clements, 148 Idaho at 85, 218 P.3d at 1146). The district court still addressed this claim of error on its merits, however, on pages 7-10 of its order (R., pp.343-46), and the state adopts as part of its argument on appeal the district court’s correct analysis contained therein.

Finally, Searcy argues that his third amended judgment of conviction for robbery with the weapons enhancement was improperly corrected in his absence. (Appellant’s brief, pp.37-40.) This argument fails on at least two bases.

First, the issue is controlled by the Court of Appeals’ opinion in State v. Searcy, 124 Idaho 107, 112, 856 P.2d 897, 902 (Ct. App. 1993) (Searcy III). In that case, the district court, complying with the Supreme Court’s directive in Searcy I, had Searcy returned to the presence of the court so it could correct Searcy’s sentencing enhancement for use of a firearm. Id. at 108-09, 856 P.2d at 898-99. The district court later issued a written final judgment. Id. at 109, 856 P.2d at 899. Searcy challenged

that judgment, claiming that it did not conform to the sentence pronounced orally by the district court. Id. at 109-10, 856 P.2d at 899-900. The district court, a new judge presiding, then attempted to “correct” the sentence. Id. at 110-11, 856 P.2d at 900-01.

The Court of Appeals, after reviewing the prior cases and the sentencing procedures, concluded that the written judgment correctly expressed the district court’s original sentence, modified in accordance with the Idaho Supreme Court’s directive. Id. at 113, 856 P.2d at 903. The Supreme Court, with the exception of the double enhancement, had affirmed the original sentence. Id. at 112, 856 P.2d at 902. The only thing the district court was authorized to do was correct the enhancement. Id. There was no need for further correction by the second judge. Id. at 113, 856 P.2d at 903. The Court of Appeals, therefore, ordered the sentence to be further amended in order to reinstate the first judge’s corrected sentence. Id.

The Court of Appeals’ directive in Searcy III was not to resentence Searcy; it was to restore the district court’s original corrected sentence, which was imposed in Searcy’s presence. As the district court correctly noted in this case, “the sentences were neither vacated, nor was the case remanded for resentencing.” (R., p.350 (internal quotes omitted).) The Court of Appeals’ opinion “did not include an express directive to impose a valid sentence with the defendant present,” as had the Supreme Court’s opinion in Searcy I. (Id.) Rather, the Court of Appeals “directed the district court to amend the previous judgment of conviction for the robbery” to clarify that, consistent with the original corrected sentence, “the enhancement portion of the robbery sentence [was] to be served as an extension to the indeterminate life sentence previously imposed.” (Id.) The district court did not impose a new sentence upon Searcy by clarifying Searcy’s

original corrected sentence, and Searcy has failed to show that the district court was required to transport Searcy back to the court to make these clarifications. The district court should be affirmed.

Second, Searcy's argument fails because he did not timely present this issue. Searcy's argument, that the district court failed to pronounce his reinstated corrected original sentence in his presence, is not an argument that the *sentence* is illegal, but that the sentence was *imposed in an illegal manner*. Under Rule 35, as it existed when Searcy's claim arose in 1993, a defendant could challenge "a sentence that is illegal from the face of the record at any time," but claims that a sentence was imposed in an illegal manner had to be raised within 120 days. That 120-day deadline in this case expired several years ago. Searcy's argument is therefore not timely raised, and the district court should be affirmed.

In conclusion, on its face, Searcy's sentence as corrected does not exceed any statutory provisions, nor is it otherwise contrary to applicable law. Searcy has failed to show any error in the district court's denial of his Rule 35 motion for correction of an illegal sentence. The district court properly addressed each of Searcy's claims and correctly denied his Rule 35 motion, and its order denying relief should be affirmed.

II.

Searcy Has Failed To Show That The District Court Abused Its Discretion When It Denied His Motion For Appointed Counsel To Pursue His Meritless Rule 35 Motion

A. Introduction

In connection with his Rule 35 motion, Searcy also filed a motion for court-appointed counsel. (R., pp.327-29.) Before addressing the merits of Searcy's Rule 35 motion, the district court denied this motion for appointed counsel, finding that a person

of adequate means would not be willing to bring the underlying Rule 35 motion at his own expense. (R., pp.340-42.) Searcy argues that the district court erred when it denied his motion for appointed counsel to pursue his Rule 35 motion. (Appellant's brief, pp.40-43.) Application of the correct legal standards, however, shows that the district court properly denied this motion.

B. Standard Of Review

The decision to grant or deny a request for court-appointed counsel in post-conviction proceedings is generally discretionary, based on the findings of the court. See Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). "Whether a motion is frivolous is a question of law that [the Court] freely review[s]." State v. Carter, 157 Idaho 900, 902, 341 P.3d 1269, 1271 (Ct. App. 2014).

C. Because Searcy's Rule 35 Motion Was Frivolous, The District Court Properly Denied Searcy's Request For Court-Appointed Counsel To Pursue That Motion

There is no constitutional right to counsel in state post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987). The Sixth Amendment only guarantees a criminal defendant the right to counsel during all "critical stages" of the adversarial proceedings against him. Estrada v. State, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006) (citing United States v. Wade, 388 U.S. 218, 224 (1967); State v. Ruth, 102 Idaho 638, 637 P.2d 415 (1981)). Although this right encompasses the first direct appeal, it does not extend to post-conviction proceedings. Lawrence v. Florida, 549 U.S. 327, 336-37 (2007); Finley, 481 U.S. at 555. "The determination whether [a] hearing is a 'critical stage' requiring the provision of counsel depends ... upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the ***

confrontation and the ability of counsel to help avoid that prejudice.” Coleman v. Alabama, 399 U.S. 1, 9 (1970) (asterisks original, quoting Wade, 388 U.S. at 227).

Rule 35 challenges do not create a critical stage of the proceedings. United States v. Jackson, 923 F.2d 1494, 1496-97 (11th Cir.1991). This is because a Rule 35 motion can “only benefit the defendant by reducing his sentence which had already become final.” United States v. Taylor, 414 F.3d 528, 537 (4th Cir. 2005). There is, therefore, no Sixth Amendment right to counsel on a Rule 35 motion. Taylor, 414 F.3d at 537; United States v. Paloma, 80 F.3d 138, 142 (5th Cir. 1996).

Though there is no constitutional right to counsel to pursue a Rule 35 motion, Idaho courts have interpreted Idaho Code § 19-851, *et seq.*, as conferring a statutory right to counsel. See Murray v. State, 121 Idaho 918, 923 n.3, 828 P.2d 1323, 1328 n.3 (Ct. App. 1992). Even this right, however, is not boundless; a district court may deny appointment of counsel if the Rule 35 motion is frivolous or one that a reasonable person with adequate means would not be willing to bring at his or her own expense. I.C. § 19-852(2)(c). A determination of whether a Rule 35 motion is frivolous for purposes of applying Idaho Code § 19-852(2)(c) is based on the contents of the motion itself and any accompanying documentation that may support the motion. State v. Wade, 125 Idaho 522, 525, 873 P.2d 167, 170 (Ct. App. 1994).

As shown above (see Argument I), Searcy’s Rule 35 motion was frivolous because, on its face, there is nothing illegal about the sentences he received. Because Searcy’s motion was frivolous, he had no right to appointed counsel—whether constitutional or statutory—and the district court correctly denied his motion. Searcy

has failed to show an abuse of the district court's discretion. The district court's order denying appointed counsel should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Searcy's Rule 35 motion for correction of an allegedly illegal sentence and denying court-appointed counsel to pursue that meritless motion.

DATED this 2nd day of August, 2017.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 2nd day of August, 2017, served two true and correct paper copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

BARRYNGTON EUGENE SEARCY
IDOC #27413
I.S.C.I. UNIT 13
P. O. BOX 14
BOISE, ID 83707

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd

APPENDIX A

FILED IN CHAMBERS AT REXBURG,
MADISON COUNTY, IDAHO.

Date: July 8, 2016

Time: 4:24 P.M.

By: G. C. Moell
DISTRICT JUDGE

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR FREMONT COUNTY**

STATE OF IDAHO,

Plaintiff,

vs.

BARRYNGTON EUGENE SEARCY,

Defendant.

Case No. 8071 /CR16-1835

**MEMORANDUM DECISION
ON DEFENDANT'S PENDING
MOTIONS**

I. INTRODUCTION

In 1988, a Fremont County jury found Barryngton Eugene Searcy ("Searcy") guilty of murdering Teresa Rice during an armed robbery in Ashton, Idaho.¹ He was later sentenced to a determinate life sentence without possibility of parole on the first degree murder charge, and a consecutive sentence of indeterminate life, with the first 10 years fixed, for the robbery charge. He also received an additional 10-year enhancement on the robbery conviction for using a firearm in the commission of the crime. Searcy's sentences were the subject of three appeals, and multiple resentencings, which are addressed in detail below.

¹ In the interest of full disclosure, the Court notes that from September 1987 until June 1988, Searcy was represented by the late Gordon S. Thatcher and the late Michael S. Kam, attorneys from the presiding judge's former law firm, then known as Rigby, Thatcher & Andrus, Chartered. This representation continued throughout Searcy's trial and his first sentencing. However, all representation was terminated on June 28, 1988, after which new counsel was appointed by the trial court. See *Letter from Fremont County Commissioners*, June 28, 1988 (filed April 21, 1989). The current presiding judge officially joined the law firm on May 1, 1990, although he previously worked as a summer law clerk from May through August of 1989. There was no period during which the presiding judge was employed by the law firm that it still represented the Defendant. The presiding judge was never involved in the case or made privy to any confidential information about the Defendant. Other than a very general knowledge of the outcome and publicly reported facts of the case, the presiding judge was unfamiliar with the details of the case and the prior proceedings before he received the pending motions. Therefore, the Court has concluded that there is no actual or apparent conflict of interest in its presiding over this matter.

Searcy, appearing as a self-represented litigant in State custody, now comes before the court, 28 years after his original sentencing, and seeks relief pursuant to I.C.R. 35(a). He argues that because his sentences are illegal, he is entitled to seek such relief regardless of the long passage of time and the three subsequent appellate proceedings. Searcy also moves the Court to appoint counsel to represent him. Additionally, Searcy has moved the Court to correct a clerical error in his most recent judgment of conviction pursuant to I.C.R. 36.

II. PROCEDURAL AND FACTUAL HISTORY

The facts of this case were mostly undisputed by Searcy at trial. The Idaho Supreme Court set forth the underlying circumstances of the case as follows:

Barry Searcy was convicted of killing Teresa Rice while robbing Jack's Grocery Store in Ashton, Idaho, July 15, 1987. Rice, the mother of two children, owned and operated the store with her husband Michael. Searcy robbed the store in order to get money to buy cocaine. Searcy had staked out the store during its operating hours and hid on top of some coolers in the back room where he waited to either burglarize or rob as the situation dictated. From this hiding spot Searcy could see Rice enter the back room and count out money for storage in the store's safe. Rice then left the back room. As Searcy was leaving his hiding spot Rice returned to the back room and discovered Searcy. A confrontation ensued and Rice was shot in the stomach by Searcy, apparently during a struggle. Searcy testified that he then told Rice that if she opened the safe he would call an ambulance. She did so. Searcy then removed the money from the safe and placed it into his backpack. Searcy did not call an ambulance. Rather, he put his rifle to Rice's head and shot her, killing her instantly.

State v. Searcy, 118 Idaho 632, 798 P.2d 914 (1990) ("*Searcy I*"). Searcy's trial and first two sentencings were presided over by the Honorable H. Reynold George, district judge. Following Searcy's conviction, this matter was the subject of three successive appeals, all of which concerned, at least in part, the legality of his sentence.

Searcy's initial appeal, *Searcy I*, addressed the constitutionality of Idaho's lack of an insanity defense and the propriety of the trial court's consideration of victim impact statements at sentencing. It also specifically addressed concerns over the legality of Searcy's sentences. The Supreme Court held that the trial court erred when it initially imposed the ten-year weapons enhancement to both the determinate life sentence for murder and the indeterminate life sentence for robbery. Additionally, the trial court's attempt to correct its invalid sentence without having the defendant present violated I.C. 19-2503 and I.C.R. 43. *Id.* at 920, 638. However, the

Supreme Court also held that except for these issues, the two life sentences imposed (determinate for the murder and indeterminate for the robbery) were not an abuse of the trial court's discretion. *Id.*, at 921, 639. Therefore, the modification made in Searcy's absence was vacated, and the matter remanded solely for the purpose of imposing a corrected sentence in Searcy's presence.

Searcy then brought a second appeal, again raising an issue concerning Idaho's lack of an insanity defense, and further alleging that his sentences were cruel and unusual. *State v. Searcy*, 120 Idaho 882, 820 P.2d 1239 (Ct. App. 1991) ("*Searcy II*"). The Idaho Court of Appeals denied the appeal.²

After the remand in *Searcy I*, Judge George again sentenced Searcy on December 3, 1990, and attempted to remedy an error noted by the Supreme Court in the first sentence. Judge George initially made the required corrections, but subsequent confusion arose due to alleged inconsistencies between the court's oral pronouncements and its later written ruling on December 31, 1990. A lengthy and complex series of motions, hearings, and appeals followed.³ On May 18, 1992, Searcy again appeared for sentencing, this time before the Honorable Marvin M. Smith. At the conclusion, Judge Smith imposed a "determinate life sentence without possibility of parole" on Searcy for the charge of First Degree Murder, and "an indeterminate life sentence with a fixed minimum of 10 years, consecutive" on the Robbery charge.⁴

Searcy's final appeal is reported in *State v. Searcy*, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993), *rev. den.* (1993) ("*Searcy III*"). In this appeal, Searcy argued that he needed to be resentenced because the sentencing court's oral pronouncement of his corrected sentence prevailed over a subsequent written recitation of sentence. Additionally he argued that the firearm enhancement to his robbery sentence was improperly ordered to be served as a fixed sentence, rather than as an indeterminate one. The Court of Appeals rejected the first argument,

² In *Searcy II*, the Idaho Court of Appeals succinctly described the subject matter of this appeal as follows:
In the present appeal, Searcy raises only two issues, neither of which relate to the proceeding conducted following the remand from the earlier appeal. First, he argues that he was denied due process during the trial proceedings because he was precluded by I.C. § 18-207 from asserting insanity as a defense. Second, he argues that section 18-207 violates the constitutional proscription against cruel and unusual punishment and deprives him of equal protection of the law. The first issue was specifically raised, addressed and decided in the earlier appeal. The second issue is one which could have been raised in the earlier appeal but was not.

Id., at 883, 1240. The Court of Appeals then affirmed the amended judgment of conviction and sentences.

³ See *State v. Searcy*, 124 Idaho 107, 109-113, 856 P.2d 897, 899-903 (Ct. App. 1993), *rev. den.* (1993)

⁴ *Decl. of Barry Searcy in Supp. of Def's Mot. to Correct an Illegal Sentence*, Exhibit K (*Tr.*, 11:16 – 12:1), Feb. 4, 2016.

holding that the sentencing judge properly revised the original sentence pursuant to the Idaho Supreme Court's directive in *Searcy I*. As to the second argument, the Court of Appeals once again affirmed the fixed life sentence on the first degree murder charge, as well as the indeterminate life sentence, with the first 10 years fixed, for robbery. However, the Court of Appeals directed the sentencing judge to amend the judgment of conviction as to the 10-year firearm enhancement associated with the robbery charge, so that the enhancement was for "an indeterminate term of ten years [to] be served as an extension of the indeterminate life sentence imposed upon the robbery conviction." *Id.*, at 113, 903. Accordingly, Judge Smith modified his sentence and entered Searcy's third and final judgment of conviction on September 30, 1993.⁵

III. DISCUSSION

Idaho Criminal Rule 35(b) provides that a motion brought under this rule "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." After carefully considering the merits and the applicable rules, as discussed below, the Court in its discretion has concluded that additional testimony and oral argument are not necessary and would not be helpful.

A. Searcy's Motion for Appointment of Counsel is denied.

In addition to seeking correction of his sentence, Searcy has asked the Court to appoint counsel to assist him in pursuing his pending motions. Normally, a court presented with a request for appointed counsel in a petition for post-conviction relief must first address that request before ruling on the substantive merits of the case and errs if it denies a petition on the merits before ruling on the applicant's request for counsel. *See, e.g., Charboneau v. State*, 140 Idaho 789, 792-94, 102 P.3d 1108, 1111-13 (2004); *Swisher v. State*, 129 Idaho 467, 469, 926 P.2d 1314, 1316 (Ct. App. 1996). However, Searcy is not seeking relief under the Uniform Post-Conviction Procedure Act, I.C. § 19-4901, *et seq.* Instead, he has brought his motion under I.C.R. 35(a). Nevertheless, it appears that the same standard applies here. In *State v. Wade*, 125 Idaho 522, 525, 873 P.2d 167, 170 (Ct. App. 1994) the Idaho Court of Appeals held that "the court is required to appoint an attorney unless the court finds that the [Rule 35] motion is

⁵ *Id.*, Exhibit M.

frivolous. That finding must necessarily precede any ruling upon the merits of the underlying complaint, motion or petition.” Therefore, the Court will address the request for court-appointed counsel first.

The Court is mindful that a criminal defendant’s right to counsel extends to all critical stage proceedings, including a Rule 35 motion. *State v. Carter*, 157 Idaho 900, 902, 341 P.3d 1269, 1271 (Ct. App. 2014), *rev. den.* (2014). *See also* I.C. §19–852; I.C.R. 44. However, “a trial court may deny a request for appointment of counsel if the motion is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense and is, therefore, a frivolous proceeding.” *Wade*, 125 Idaho at 523, 873 P.2d at 168. This standard comes from I.C. §19–852, which similarly provides:

(2) An indigent person who is entitled to be represented by an attorney ... is entitled:

...

(c) To be represented in any other post-conviction or post-commitment proceeding that the attorney or the indigent person considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.

I.C. § 19–852(2)(c). The decision to grant or deny a request for court-appointed counsel is typically discretionary, based on the reasoned findings of the court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). Discretionary decisions require the Court to (1) correctly perceive the issue as one of discretion, (2) act within the outer boundaries of the discretion allotted, and (3) reach the decision through the exercise of reason. *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 560, 212 P.3d 982, 990 (2009).

Given the magnitude and severity of Searcy’s sentence, the Court has labored to liberally construe all inferences in Searcy’s favor. The Court has carefully reviewed Searcy’s pleadings, as well as the voluminous record of the proceedings below from 1987 to 1993. Initially, the Court concludes that Searcy clearly meets the indigency requirement for appointed counsel. However, for reasons that are addressed in much more detail in Section III.B of this decision, *infra*, the Court concludes that Searcy is not entitled to court-appointed counsel because his claims are frivolous and do not rise to the level where “a reasonable person with adequate means would be willing to bring [it] at his own expense.”

As well briefed and clearly articulated as Searcy's claims for relief under Rule 35(a) may be, they are merely a reiteration of arguments that either were raised, or should have been raised, in Searcy's three earlier appeals. Indeed, some of the issues he now raises were considered and rejected by the Court of Appeals in *Searcy III*. There are other substantive defects in Searcy's legal analysis that are outlined in more detail in Section III.B(2), *infra*. For example, the majority of his argument concerns an allegedly improper jury instruction given at the conclusion of his trial, an issue solely related to his underlying conviction—not his sentence. In essence, although Searcy is contending that his sentence is illegal on its face, he is simply alleging the type of procedural and evidentiary defects in his trial and sentencing that must be raised on direct appeal. He has offered no explanation as to why these defects were not—or could not have been—asserted in any of his three prior appeals. In short, despite his assertions to the contrary, Searcy's motion fails to properly assert any claims establishing that his sentence was “improper on its face,” as Rule 35(a) clearly requires.

The law is clear that a motion brought pursuant to Rule 35 “does not function as an appeal of a sentence.” *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). *See also Smith v. State*, 129 Idaho 162, 166, 922 P.2d 1088, 1092 (Ct. App. 1996) (“A rule 35 motion is not analogous to an appeal”); *Lyneis v. State*, No. 40919, 2014 WL 1330016, at *3 (Idaho Ct. App. Apr. 3, 2014) (“[A] Rule 35 motion is not a replacement for a direct appeal of a sentence.”) Indeed, if the Court were to deem the subject matter of Searcy's motion as a proper basis for Rule 35 relief, it would essentially render the time period for seeking an appeal of a sentence meaningless, and would invite an endless cycle of appeals for decades after a conviction. Inasmuch as this motion appears to be no more than a thinly veiled attempt to appeal his sentence for a fourth time—or perhaps an effort to create grounds for a fourth appeal—the Court must conclude that the motion is frivolous. Because no reasonable person with adequate means would be willing to pay an attorney to bring such a motion, Searcy should not be permitted to pursue his motion at public expense.

B. Searcy's Motion to Correct Illegal Sentence is denied.

The same reasoning that formed the basis for denying Searcy's motion for appointed counsel can also be applied to the merits of his motion to correct his sentence under I.C.R. 35(a). As discussed above, it is procedurally improper for Searcy to challenge the legality of his

sentence—almost 25 years after the fact—by claiming his sentence is “illegal” solely due to defects in the trial and sentencing procedures. However, given the severity of his sentences, and out of an abundance of caution, the Court will address the merits of his motion.

(1) Standard for reviewing a Rule 35(a) Motion

The *Third Amended Judgment of Conviction* in this case was entered on September 30, 1993, over 22 years before Searcy brought his current motion to correct his sentence. However, Searcy correctly asserts that pursuant to I.C.R. 35(a), a trial court has jurisdiction to “correct a sentence that is illegal from the face of the record at any time.” The issue of whether a sentence is illegal is generally a question of law. *State v. Ramsey*, 159 Idaho 635, 364 P.3d 1200, 1201 (Ct. App. 2015), *rev. den.* (2016). The Idaho Supreme Court has explained:

[T]he term “illegal sentence” under Rule 35 is **narrowly interpreted** as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing. This interpretation is harmonious with current Idaho law. As this Court recently noted in *State v. Farwell*, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007), Rule 35 is a “**narrow rule**.” Because an illegal sentence may be corrected at any time, the authority conferred by Rule 35 should be **limited** to uphold the finality of judgments. Rule 35 is not a vehicle designed to reexamine the facts underlying the case to determine whether a sentence is illegal; rather, the rule only applies to a **narrow category of cases** in which the sentence imposes a penalty that is simply not authorized by law or where new evidence tends to show that the original sentence was excessive.

State v. Clements, 148 Idaho 82, 86, 218 P.3d 1143, 1147 (2009) (Emphasis added).

The Court notes that in the case at hand, it appears that Searcy’s sole basis for relief is that the sentence imposed in the *Third Amended Judgment of Conviction* was not authorized by law. He has brought no new evidence to the Court’s attention.

(2) Searcy is not entitled to Rule 35(a) relief based on the merits of his motion.

Searcy has asserted four different grounds upon which he contends his sentence was illegal. The Court will address the merits of each claim in turn.

(a) Searcy’s claim that his fixed life sentence for first degree murder was imposed without a finding of the required aggravating factors.

The Court is mindful that the fixed life sentence Searcy received is “the harshest penalty available under Idaho law, short of the death penalty.” *State v. Eubank*, 114 Idaho 635, 637, 759 P.2d 926, 928 (Ct. App. 1988). Searcy cites *Eubank* in support of his contention that the

sentencing court failed to cite at least one of the two aggravating circumstances “with certainty” in support of his fixed life sentence for first degree murder.⁶ The actual rationale of the Court of Appeals in *Eubank* is set forth below:

Upon this record a judge would be unable to find, with a high degree of certainty, that Eubank never could be safely returned to society on parole. Indeed, the district judge did not make such a finding. Instead, he made a cautious observation that “rehabilitation is always a possibility but it’s—it certainly is a very slight probability in this case.”

We commend the judge for his conscientious approach, but we hold that the fixed life sentence was inappropriate. We vacate the sentencing portion of the judgment and direct the district court on remand to enter a modified judgment. ...

... By carefully structuring the sentences, the court can ensure that correctional authorities will confine Eubank for a lengthy period, without rigidly forcing them to hold him in prison long after rehabilitative progress or the biological effects of increasing age may have ameliorated the risk of recidivism.

Id. at 639, 930. After carefully reviewing the record, the Court finds that Searcy is mistaken—*Eubank* does not render his sentence illegal or require any correction of his sentence pursuant to I.C.R. 35(a) because the trial court acted consistent with its holding.

Following his trial and the jury’s finding of guilt, the State sought the death penalty. The record establishes that during his first sentencing on May 31, 1988, Judge George carefully delineated his findings concerning the required statutory aggravating factors then necessary to impose a death sentence. I.C. § 19- 2515 (1988). Although the trial court ultimately declined to impose the death penalty, it thoroughly discussed the appalling facts of Searcy’s actions towards the victim, and it found that multiple aggravating factors existed. Among the trial court’s findings, which it was able to make beyond a reasonable doubt “without any laborious effort,”⁷ were the following:

- The “sordid facts” of the murder established that it was a “heinous, atrocious, and cruel murder, manifesting exceptional depravity.”⁸
- The murder itself, and its surrounding circumstances, established that Searcy exhibited “an utter disregard of human life.”⁹

⁶ *Mem. in Supp. of Def.’s Mot. to Correct Illegal Sentence*, at 9 (Feb. 4, 2016).

⁷ *Decl. of Barry Searcy*, Exhibit E (*Tr.*, 2333:5-9). See also *Judgment of Conviction*, May 31, 1988, and Judge George’s attached *Sentencing Memo*, both contained within Exhibit E.

⁸ *Id.*, at 2331:16-18.

⁹ *Id.*, at 2331:19-21.

- The first degree murder “was accompanied with the specific intent to cause the death of a human being.”¹⁰
- Searcy “by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.”¹¹
- Before committing the armed robbery and first degree murder he was being sentenced for, Searcy had admitted to committing two armed robberies in Utah. The court concluded that Searcy had now “progress[ed] ... from a threat of bodily harm to needless taking of a life and thus there exists the propensity to continue going after the money as a robber prepared to erase the chances of the victim to identify him.”¹²

The trial court ultimately weighed these facts—which it found existed beyond a reasonable doubt—against the mitigating facts, including Searcy’s age, intelligence, and addiction to cocaine. The trial court then concluded that as far as the death penalty was concerned, “the mitigating factors outweighed the aggravating circumstances.”¹³ However, notwithstanding its decision to not impose the death penalty, the court imposed a fixed life sentence.

When Searcy appeared for sentencing a third time following *Searcy I*, Judge Smith carefully reviewed the original sentencing. He then concluded:

In the transcript [Searcy’s attorney] refers to there is no indication Judge George was going to change his mind from that original sentence. I have to give great deference to the original sentence in that it was actually written out. And I believe Judge George probably read from that. So for that reason **the Court is going to accept the findings, conclusions, and specifically the contrasting of aggravating factors with mitigating factors** under Idaho Code Section 19-2515.¹⁴

There can be no question that in making his oral pronouncement of sentence, and in entering the second amended judgments of conviction on July 1, 1992,¹⁵ Judge Smith had reviewed and adopted the same aggravating factors identified by Judge Smith at the original sentencing.

¹⁰ *Id.*, at 2332:8-10.

¹¹ *Id.*, at 2332:18-21.

¹² *Id.*, at 2332:22 – 2333:4.

¹³ *Id.*, at 2337:5-13, 16-19.

¹⁴ *Id.*, at 11:4-13 (emphasis added).

¹⁵ *Id.*, Exhibit L.

Searcy's argument that the factors identified in *Eubank* were not considered "with certainty" does not bear scrutiny. Although he was spared from the death penalty at his original sentencing in 1988, Judge George made specific findings which fully supported a fixed life sentence. He found beyond a reasonable doubt that Searcy's crime was heinous and depraved, demonstrated an utter disregard for human life, occurred with a specific intent to kill, and that he posed a continuing threat to society." Five years later, Judge Smith reviewed and adopted those same findings, and again imposed a fixed life sentence. This Court now concludes—twenty-five years later and following three successive appeals—that Searcy's determinate life sentence for the brutal killing of Teresa Rice was properly imposed.

(b) Searcy's claim that his consecutive sentences for first degree murder and robbery were imposed without a proper finding that the crimes were separate and distinct acts.

Searcy contends that his consecutive sentences for first degree murder and robbery were improperly imposed without a requisite finding that the crimes arose out of separate and distinct acts. He argues that in the absence of such a finding, *State v. Spurr*, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988) mandates the sentences run concurrent. He offers no explanation for why this issue was not raised in any of his previous appeals.¹⁶

Although *Spurr* addressed the issue of whether the crimes of battery on an officer and obstructing an officer constitute separate and distinct acts, the principle holding of the case was that the trial court improperly failed to give a jury instruction pertaining to a defendant's right to resist if law enforcement used excessive force against him. *Id.*, at 279-80, 1317-18. The portion of the decision addressing separate and distinct acts was only offered "for guidance on remand," and held that the jury must be instructed that "they cannot convict of both offenses unless they are convinced beyond a reasonable doubt that both alleged crimes arose out of separate and distinct acts, each accompanied by criminal intent." *Id.*, at 280, 1318. *Spurr* contains no discussion about the relative merits of a consecutive versus a concurrent sentence, assuming there are convictions on both charges. At best, *Spurr* is solely applicable to the guilt or innocence phase of a trial, not the sentencing phase. Similarly, the former I.C. § 18-301, in effect during Searcy's trial but since repealed, also appears to primarily concern the manner in which

¹⁶ The Court notes that given Searcy's determinate life sentence without possibility of parole for murder, making his indeterminate life sentence for robbery run concurrent would essentially afford him no practical relief of his sentence.

crimes are charged. *See* § 18-301. Repealed by S.L. 1995, ch. 16, § 1, eff. Feb. 13, 1995. Therefore, these are issues that should have been raised on direct appeal.¹⁷

Assuming, *arguendo*, that this argument is properly raised now, the Court notes that there is no merit to Searcy's argument. Premeditated first degree murder and robbery are clearly two distinct crimes with completely different elements. Indeed, the statutory descriptions of both crimes provide no basis to logically conclude they overlap. First degree murder concerns the taking of a human life with malice aforethought, while robbery concerns the theft of personal property by force or fear. Even if by some means of speculative legal sophistry it could be argued that these two crimes could theoretically overlap, such an argument would be inapplicable to the facts of this case. When discovered in the store, he shot and wounded the victim. It is undisputed that Searcy gained access to the store's safe from the victim at gunpoint. He promised to call an ambulance for the victim if she helped him open the safe. After he had access to the safe and had removed the money, he shot the victim in order to prevent her from identifying him later.

In the case at hand, it is apparent that the murder and robbery charges were treated as separate and distinct from the time the crime was charged.¹⁸ The case went to the jury on charges of: Count I, first degree premeditated murder (I.C. § 18-4003(a)) or, in the alternative, felony murder (I.C. §§ 18-4003(d)), and Count II, robbery (I.C. § 18-6501). In fact, the jury was instructed, apparently without objection, that Counts I and II each charged "a separate and distinct offense."¹⁹ The instruction given at Searcy's trial is almost identical to the current version of Idaho Criminal Jury Instruction 110.²⁰ This is a standard instruction, given to the jury in almost every case with multiple counts. The giving of such an instruction, rather than asking the jury to find the crimes were separate and distinct, has been approved in multiple appellate rulings. *See e.g., State v. Eguilior*, 137 Idaho 903, 909, 55 P.3d 896, 902 (Ct. App. 2002). Therefore, before closing arguments were heard, the Court must have reasonably and properly concluded that the robbery and murder charges were each separate and distinct crimes.

¹⁷ Although not necessarily controlling, it is unclear from the record whether Searcy even requested a separate and distinct act instruction.

¹⁸ *Decl. of Barry Searcy*, Exhibit A (*Criminal Complaint and Information of the Crime*).

¹⁹ *Id.*, Exhibit C (*Jury Instruction No. 35*).

²⁰ "Each count in the Information charges a separate and distinct offense. You must decide each count separately on the evidence and the law that applies to it, uninfluenced by your decision as to any other count. The defendant may be found guilty or not guilty on either or both of the offenses charged." ICJI 110.

After the jury found Searcy guilty of both premediated first degree murder and felony murder, Judge George made it clear that he was only sentencing for one murder count: premediated first degree murder.²¹ Additionally, at sentencing Judge George clearly recognized the separate and distinct nature of the crimes:

Mr. Searcy came to a point when he envisioned the possibility and the need to kill some unknown victim. **He needed money** and the value of the life of the victim came out lower on the scale than getting a lot of money. **Then came the killing.** The victim was maimed by an initial shot. There was no doubt an appeal for sympathy. That sympathy if acceded to would have left one who could identify the robber and only an inhuman reaction could have caused the **pulling of the trigger** with the gun barrel at the head.²²

Barryngton Eugene Searcy by a twisted mind elevated his desires to a point that a **killing became a possibility if necessary to carry out a robbery.** The purchase and preparation of the gun alone with the planning of the robbery knowing that a gun might well be used to accomplish the evil act is sufficient to show utter disregard for human life.²³

There can be no doubt that Judge George properly reviewed the two crimes and found them to be separate and distinct acts. After committing the robbery, the undisputed evidence showed that Searcy consciously decided to kill the victim. Therefore, this Court concludes the Searcy was legally sentenced for separate and distinct crimes.

(c) Searcy's claim that his conviction of First Degree Murder was obtained through unconstitutional evidentiary presumptions contained in the jury instructions.

Searcy's third contention, to which he devotes the bulk of his argument,²⁴ is that he was denied due process under the Fourteenth Amendment to the U.S. Constitution because the trial court gave the jury an improper instruction. Citing *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), and its progeny, Searcy essentially asserts that his sentence is "illegal" under Rule 35(a) because the jury was improperly instructed on the issue of malice.

There is no point in addressing the substantive merits of Searcy's contention in depth because this is clearly an inappropriate argument to raise in a Rule 35 proceeding. "An illegal

²¹ *Decl. of Barry Searcy*, Exhibit E (*Tr.*, 2329:8-15).

²² *Id.*, at 2331:7-16 (emphasis added).

²³ *Id.*, at 2331:24 – 2332:5 (emphasis added).

²⁴ *Mem. in Supp. of Def.'s Mot. to Correct Illegal Sentence*, at 11-20.

sentence under Rule 35 is one in excess of a statutory provision or otherwise contrary to applicable law.” *State v. Alsanea*, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003). As this court has noted, *infra*, “Rule 35 is not a vehicle designed to reexamine the facts underlying the case to determine whether a sentence is illegal; rather, the rule only applies to a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law or where new evidence tends to show that the original sentence was excessive.” *Clements*, 148 Idaho at 86, 218 P.3d at 1147. Searcy had a full opportunity to assert this same argument during each of his three successive appeals but failed to do so. He is not permitted to bootstrap what would essentially be his fourth appeal by attacking his jury instructions via a Rule 35(a) motion. Because Rule 35 is solely intended to address the nature of the sentence imposed, not the manner in which the trial was conducted, the Court concludes that it has no jurisdiction to even address this issue.

(d) Searcy’s claim that his *Third Amended Judgment* was illegally corrected in his absence.

Searcy’s final argument is that Judge Smith issued his third amended sentence in his absence, thus repeating the same error that was noted by the Idaho Supreme Court in *Searcy I*. See *Searcy I*, 118 Idaho at 637-39, 798 P.2d at 919-21. In making this assertion, Searcy has ignored the distinct difference between the holdings and directions given by the Idaho appellate courts in *Searcy I* and *Searcy III*.

In its decision in *Searcy I*, the Supreme Court “vacated” the trial court’s order correcting Searcy’s sentence and “remanded [the case] to the trial court for imposition of a valid sentence with the defendant present as required by I.C. § 19-2505, I.C.R. 43(a), and *Lopez v. State*, 108 Idaho 394, 700 P.2d 16 (1985).” *Id.* at 639, 921. On the other hand, at the conclusion of the Court of Appeals’ decision in *Searcy III*, it directed the sentencing court as follows:

Accordingly, **we direct** the district court to **further amend** the judgment of conviction for the robbery, entered on July 1, 1992, to state that the enhanced portion of the sentence for that crime, imposed for the use of a firearm in committing the offense, is for an indeterminate term of ten years and shall be served as an extension of the indeterminate life sentence imposed upon the robbery conviction. Of course, the indeterminate life sentence enhanced by ten years will be served consecutively to the fixed life sentence imposed for the murder conviction, and the minimum period of confinement of ten years on the

robbery sentence also will remain undisturbed. **As so modified, the sentences are affirmed.**

Searcy III, 124 Idaho at 113, 856 P.2d at 903. (Emphasis added). Unlike in *Searcy I*, in *Searcy III* the sentences were neither vacated, nor was the case remanded for resentencing. Instead, the Court of Appeals “directed” the district court to “amend the previous judgment of conviction for the robbery” in a specific manner to clarify that the enhancement portion of the robbery sentence is to be served as an extension to the indeterminate life sentence previously imposed. With that specific modification directly ordered, the Court of Appeals affirmed the sentence.

It is worth noting that that unlike *Searcy I*, *Searcy III* did not include an express directive to “impose a valid sentence with the defendant present.” *Searcy I*, 118 Idaho at 639, 798 P.2d at 921. Instead, the corrected sentence was already affirmed by the Court of Appeals, as modified. In practical terms, this means that there was simply no resentencing hearing for Searcy to attend. Indeed, Searcy has set forth no right under the U.S. Constitution or Idaho law to be transported across the state merely to witness the district judge sign a corrected judgment of conviction. Therefore, the Court concludes that Judge Smith did not error in following the directive of the Court of Appeals by simply amending the judgment of conviction without conducting a new sentencing with the defendant present.

The Court notes that even if Searcy is correct in his assertions, this issue does not appear to be proper for a Rule 35(a) motion because the error asserted does not concern the imposition of “a penalty that is simply not authorized by law.” *Clements*, 148 Idaho at 86, 218 P.3d at 1147. Rather, because it concerns the procedural aspects of his sentencing, it should have been addressed via a timely appeal. Indeed, Searcy should have been aware of this requirement inasmuch as he properly asserted this identical issue on direct appeal in *Searcy I*.

C. Searcy’s Motion to Correct Clerical Mistake is granted. (I.C.R. 36)

Finally, Searcy asserts that his name was misspelled in “numerous court records” and Idaho Department of Correction records.²⁵ He seeks relief under I.C.R. 36, which provides:

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

²⁵ *Def.’s Mot. to Correct Clerical Mistake*, at 2 (Feb. 4, 2016); *Decl. of Barry Searcy in Supp. of Def.’s Mot. to Correct Clerical Mistake*, ¶ 3 ((Feb. 4, 2016).

Having reviewed the record, the Court finds that over the course of this case Searcy's first name has been spelled several different ways, for example: "Barryngton" in *Searcy I*, "Barrington" in *Searcy II*, and "Barry" in *Searcy III*. The Court further finds that "Barryngton," without an "i" appears to be the correct spelling of Searcy's first name. This is how Searcy's name was spelled in 1987 in the initial charging documents.²⁶ The Court can find no explanation for how or why this clerical error originated.

In the interest of accuracy, the Court concludes that Searcy's *Third Amended Judgment of Conviction*, dated September 30, 1993, should be corrected so that the defendant's name is properly spelled as "Barryngton Eugene Searcy." Although the Court's jurisdiction to make such a correction under Rule 36 extends to the Court's own records, it does not extend to the records maintained by the Idaho Department of Corrections, although it will be advised of this change. Because there has been no demonstrated utility in making any other changes in the court record, only the most recent judgment of conviction will be corrected.

Additionally, the Court notes that the mere correction of a spelling error, since it does not address the substance of the underlying sentence, will not provide Searcy a legal basis for further challenging his sentence under Rule 35, or extending the time for filing an appeal.

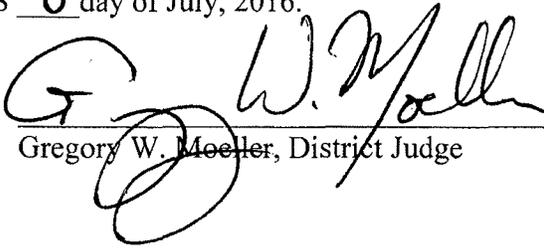
IV. CONCLUSION

The Court is mindful of the difficulty in effectively evaluating claims from a case almost thirty years old. Nevertheless, the Court has endeavored to make a thorough review of the record before deciding this matter, which necessarily required considerable time as it gathered and examined old, archived records. Now, being fully advised in the premises, and for the reasons set forth above, the Court hereby rules as follows:

1. Searcy's motion for court-appointed counsel to assist in his Rule 35(a) motion is DENIED;
2. Searcy's Rule 35(a) motion is DENIED; and
3. Searcy's Rule 36 motion is GRANTED, and the *Third Amended Judgment of Conviction*, dated September 30, 1993, shall be corrected so that the defendant's name is properly spelled as "Barryngton Eugene Searcy."

²⁶ *Decl. of Barry Searcy*, Exhibit A.

SO ORDERED THIS 8th day of July, 2016.



Gregory W. Moeller, District Judge

