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### State v. Herrera Appellant's Brief Dckt. 45671

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45671
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY NO. CR 2017-4331
v.	)	
	)	
RONALD VAUGHN HERRERA,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Ronald Vaughn Herrera appeals from the district court's Order Denying Defendant's Rule 35 Motion. Mr. Herrera was sentenced to a unified sentence of twenty-five years, with ten years fixed, for his sexual battery conviction. He asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence.

Statement of the Facts & Course of Proceedings

On April 28, 2017, an Information was filed charging Mr. Herrera with two counts of sexual battery. (R., pp.54-55, 61-62.) The charges were the result of Mr. Herrera and his Pastor

contacting the Post Falls Police Department. (PSI, p.20.)<sup>1</sup> Mr. Herrera turned himself in for inappropriately touching his adoptive daughter. (PSI, p.20.)

Mr. Herrera entered a guilty plea to one count of sexual battery. (R., pp.65-67.) At sentencing, the prosecution recommended imposition of a unified twenty-five year sentence, with fifteen years fixed. (Tr. 8/1/17, p.16, L.25 – p.17, L.2.) Defense counsel requested that Mr. Herrera be provided an opportunity to participate in a retained jurisdiction, with a five year fixed sentence. (Tr. 8/1/17, p.22, Ls.1-4.) The district court imposed a unified twenty-five year sentence, with ten years fixed. (R., pp.77-79.)

Mr. Herrera filed a Motion for Reconsideration of Sentence Pursuant to I.C.R. 35 timely from the judgment of conviction. (R., p.50.) Following a hearing, the district court denied the motion. (R., p.90.) Mr. Herrera filed a Notice of Appeal timely from the district court's Order Denying Defendant's Rule 35 Motion. (R., pp.93-96.)

### ISSUE

Did the district court abuse its discretion when it denied Mr. Herrera's Idaho Criminal Rule 35 Motion for a Reduction of Sentence?

### ARGUMENT

#### The District Court Abused Its Discretion When It Denied Mr. Herrera's Rule 35 Motion For A Reduction Of Sentence

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App.

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<sup>1</sup> For ease of reference, the electronic file containing the Presentence Investigation Report and attachments will be cited as "PSI" and referenced pages will correspond with the electronic page numbers contained in this file.

1994) (citing *State v. Forde*, 113 Idaho 21 (Ct. App.1987) and *State v. Lopez*, 106 Idaho 447 (Ct. App. 1984)). “The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable.” *Id.* (citing *Lopez*, 106 Idaho at 450).

The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). In order to show an abuse of discretion, Mr. Herrera must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). “When 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).

Appellate courts use a three-part test for determining whether a district court abused its discretion: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *State v. Stevens*, 146 Idaho 139, 143 (2008) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991)).

Mr. Herrera asserts that the district court failed to give proper weight and consideration to the new or additional information provided in support of his Rule 35 motion and the mitigating factors that exist in his case and, as a result, did not reach its decision by an exercise of reason.

Mr. Herrera provided new or additional information in support of his Rule 35 motion. Specifically, he presented the testimony of Dr. Paul Wert, a senior psychosexual evaluator. (Tr. 10/12/17, p.6, L.1 – p.12, L.5.) Dr. Wert noted that Mr. Herrera had a low/moderate risk of sexual recidivism, he was “quite motivated for treatment”, his age serves as “protective factor” for recidivism, and he had shown he could resist offending. (Tr. 10/12/17, p.7, L.20 – p.11, L.12.)

Mr. Herrera also testified at the Rule 35 hearing. (Tr. 10/12/17, p.13, L.1 – p.20, L.17.) He noted that he had been assaulted in prison due to his crime. (Tr. 10/12/17, p.14, Ls.5-12.) He has not received treatment and was hoping to get treatment while in custody. (Tr. 10/12/17, p.14, Ls.22-25.) He also stated that:

I was guilty for what I did, and I – I confessed for what I did, and I – I never fought it. There hasn't been a day that I haven't thought about my stepdaughter, my wife, and our other three children for all I have done, the guilt and the shame, which doesn't compare to what I have done to them, the peace [sic] against my stepdaughter, and the betrayal of my wife and my family, and tier trust in me as a father and stepfather, and a husband. And not to mention the devastation and destruction that I put our family though just at my hand of selfishness and disrespect for them.

I know I have stolen a lot from my stepdaughter, her childhood or innocence. And I know that my deeds [w]ill affect her for the rest of her life, not only her but my wife and other children as well, my other daughters. And I just feel like I have failed them in every way.

. . . I wish I could get rehabilitation. And that's what I was hoping for, you know.

(Tr. 10/12/17, p.16, L.5 – p.20, L.5.)

Mr. Herrera asserts this new or additional information counsels toward a reduction in sentence.

Additionally, he asserts that the district court failed to give proper weight and consideration to the mitigating factors present at the time of his sentencing. Idaho courts have

previously recognized that Idaho Code § 19-2523 requires the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581 (1999). Mr. Herrera suffers from Avoidant (socially) Personality Disorder with depressive and possibly sadistic personality features or traits, Adjustment Disorder with anxiety, and Major Depressive Disorder. (PSI, pp.9, 44.) Recently, he has been taking Zoloft to treat his depression. (PSI, p.27.)

In *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that family and friend support were factors that should be considered in the Court's decision as to what is an appropriate sentence. *Id.* Mr. Herrera has the support of his family. His mother and sister both testified at the sentencing hearing and noted that while they did not condone his actions, both women continued to support Mr. Herrera. (Tr. 8/1/17, p.7, L.15 – p.8, L.18.)

In *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991), the Idaho Court of Appeals reduced the sentence imposed, "In light of Alberts' expression of remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character." *Id.* 121 Idaho at 209. Mr. Herrera has repeatedly expressed his remorse for committing the instant offense. (PSI, pp.21, 29; Tr. 8/1/17, p.23, L.8 – p.24, L.12.)

Based upon the additional information presented with his Rule 35 motion and the mitigating factors present in his case, Mr. Herrera asserts that the district court abused its discretion in denying his Rule 35 motion. He asserts that had the district court given proper weight and consideration to his willingness to complete treatment, mental health concerns, family support, and remorse, it would have granted the Rule 35 motion and reduced his sentence.

CONCLUSION

Mr. Herrera respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 4<sup>th</sup> day of May, 2018.

\_\_\_\_\_/s/\_\_\_\_\_  
ELIZABETH ANN ALLRED  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4<sup>th</sup> day of May, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

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

EAA/eas