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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47006-2019
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR-FE-2012-8173
v.)	
)	
SUZANA MARIE CONNOR,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Suzana Marie Connor entered a conditional guilty plea to felony DUI, preserving her right to appeal the denial of her motion to extend the time for her to file a motion to suppress. Ms. Connor asserts that the district court erred by denying her motion to extend time for her to file suppression motions, where she demonstrated good cause and excusable neglect. In this case, Ms. Connor sought suppression because her blood was forcibly drawn from her body absent her consent and absent a warrant. Ms. Connor demonstrated good cause and excusable neglect where the Idaho Supreme Court had recently determined that a forced blood draw was unconstitutional. This Court should vacate Ms. Connor's judgment of conviction and the order denying the motion to file a motion to suppress, and remand this case to the district court so that Ms. Connor may file a motion to suppress and the court may consider the motion on its merits.

Alternatively, Ms. Connor contends that her sentence of ten years, with two years fixed, represents an abuse of the district court's discretion, as it is excessive given any view of the facts. She further contends that the district court abused its discretion in failing to reduce her sentence in light of the additional information submitted in conjunction with her Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion and failed to consider relevant information presented in support of her Rule 35 motion.

Statement of the Facts and Course of Proceedings

On June 4, 2012, at approximately 6:30 in the morning, officers were dispatched to a gas station. (Presentence Investigation Report (*hereinafter*, PSI), p.3; Supp. R.,¹ p.165.) One of the gas station employees reported that a woman was in the gas station asking for a ride, and she was believed to be intoxicated. (PSI, pp.3-4.) Her car was parked in the gas station parking area. (PSI, p.3.) Officer Moore spoke to Ms. Connor who said that the car belonged to her husband and that he had walked somewhere else after driving to the gas station. (PSI, p.3.) Ms. Connor was arrested for suspicion of DUI. (PSI, p.3.) Ms. Connor refused to perform field sobriety testing and refused to blow into the breathalyzer. (PSI, pp.3-4.) She was taken to the jail and blood was forcibly extracted from her arm.² (PSI, p.3; Supp. R., p.165.) Ms. Connor's blood alcohol content was .292. (PSI, p.4.) Ms. Connor had twice been convicted of felony DUI, in 1999 and in 2006. (PSI, pp.11-12.)

Based on these facts, the State filed an Information on October 4, 2012, which alleged that Ms. Connor committed felony DUI. (R., pp.43-44.) Ms. Connor was arraigned and pleaded not guilty on October 16, 2012. (R., pp.49-50.) A jury trial was set for February 27, 2013. (R., pp.56-59.) The State moved to amend the Information to allege a Part II persistent violator sentencing enhancement. (R., pp.62-63.) The State's motion was set to be heard on January 15, 2013. (R., pp.64-65.) The motion was not set during a hearing; therefore, Ms. Connor was not present when the district court announced the hearing date. (1/14/13 Tr., p.17, L.23 – p.18, L.12.) Ms. Connor did not appear for the hearing, and a warrant was issued on January 31, 2013.

¹ The prior record in Ms. Connor's earlier appeal (No. 41489-2013) was augmented with documents filed after 2013. (Supp. R., p.2.) The augmented portion of the record shall hereinafter be referred to as the "Supplemental Record" or "Supp. R."

(R., pp.66-70.) The surety bond was forfeited. (R., p.71.) Big Dawg Bail Bonds moved to set aside the bond forfeiture and exonerate the bond. (R., pp.72-75, 90-95.) The district court denied the motion, in part, by only partially exonerating the bond, and counsel for Big Dawg Bail Bonds filed a timely notice of appeal on October 7, 2013. (R., pp.98-106, 110-124.) On September 29, 2014, the Idaho Supreme Court affirmed the district court's decision in *State v. Big Dawg Bail Bonds*, 157 Idaho 373 (Ct. App. 2014).

Ms. Connor was arrested in Oregon in August of 2018.³ (Supp. R., p.20.) On August 21, 2018, the district court held a status conference and set the matter for a jury trial to begin on January 28, 2019. (Supp. R., pp.36-39.) The district court's order did not include any deadlines for the filing of motions pursuant to I.C.R. 12. (Supp. R., pp.36-37.) On September 6, 2018, Ms. Connor filed a Motion and Memorandum in Support of Motion to Suppress. (Supp. R., pp.40-43.) She asserted that the evidence gathered against her should be suppressed because her blood was drawn against her will—she revoked her implied consent and the officers did not obtain a warrant before forcibly drawing her blood. (Supp. R., pp.40-43.) The State objected and asserted that, for the motion to be timely, it was required to be filed no later than 28 days after the “not guilty” plea was entered, in this case, by December 11, 2012. (Supp. R., pp.72-75.) The State asserted that Ms. Connor failed to appear on January 15, 2013—thirty-five days after the deadline had passed. (Supp. R., pp.73-74.) The State claimed that Ms. Conner had not shown good cause or excusable neglect to extend the filing deadline for I.C.R. 12 motions. (Supp. R., p.74.)

² Ms. Connor told the presentencing investigator that the blood sample was contaminated—the person performing the blood draw used over-saturated alcohol wipes prior to drawing her blood. (PSI, p.5.) Ms. Conner stated the alcohol was “dripping down my arm.” (PSI, p.5.)

³ Ms. Connor had been living abroad for several years. (PSI, pp.16-18.)

A hearing was held on Ms. Connor's motion. (Supp. R., pp.51-54; 1/14/19 Tr.) The parties did not dispute the basis for Ms. Connor's motion—her blood was forcefully drawn absent consent or a warrant. (Supp. R., pp.42, 73.) At the hearing, the district court found Ms. Connor's motion to suppress was untimely filed, and no good cause or excusable neglect warranted extending the time. (Supp. R., pp.68-74.) The district court assumed for purposes of the motion to enlarge time that Ms. Connor's blood was drawn without her consent, but did not address the merits of the suppression motion and did not hear evidence or testimony regarding the circumstances under which Ms. Connor's blood was forcibly drawn.⁴ (1/14/19 Tr., p.16, L.25 – p.17, Ls.14.)

The district court denied Ms. Connor's motion to enlarge the time to file a motion to suppress, finding that the motion was filed 1,267 days late and neither good cause nor excusable neglect excused the late filing. (Supp. R., pp.108-27.)

Ms. Connor entered a conditional guilty plea. (Supp. R., pp.133-37.) Ms. Connor preserved her right to appeal the denial of the motion to enlarge the time to file a motion to suppress.⁵ (1/29/19 Tr., p.36, L.23 – p.40, L.20; p.50, L.4 – p.53, L.16; Supp. R., pp.136-37.) Ms. Connor pled guilty to felony DUI and, pursuant to a plea agreement, the State agreed to dismiss the persistent violator sentencing enhancement. (1/29/19 Tr., p.40, L.20 – p.41, L.5; R., pp.133-46.)

⁴ Since the district court's decision, but while Ms. Connor's case was pending on appeal, the Idaho Supreme Court decided *State v. Clarke*, 165 Idaho 393 (2019). In *Clarke*, the Court held that Mr. Clarke's arrest for misdemeanor battery committed outside the presence of law enforcement was in violation of the Idaho Constitution. Based upon the facts of her case, Ms. Connor may have an additional basis for suppression.

⁵ At the change of plea hearing, the district court clarified that its order denying Ms. Connor permission to file a late motion to suppress applied to the suppression of the blood draw as well as any other basis for suppression. (1/29/19 Tr., p.48, L.16 – p.49, L.11.)

At Ms. Connor's sentencing hearing, the State asked the district court to sentence Ms. Connor to a term of ten years, with two and one-half years fixed. (3/19/19 Tr., p.77, Ls.10-20.) The defense asked the court to place Ms. Connor on probation. (3/19/19 Tr., p.82, Ls.17-19.) The district court sentenced Ms. Connor to a term of ten years, with two and one-half years fixed.⁶ (3/19/19 Tr., p.99, L.24 – p.100. L.4; Supp. R., pp.154-158.) Ms. Connor filed a timely Notice of Appeal. (Supp. R., pp.166-173, 185-189; Aug., pp.27-31.)

Thereafter, Ms. Conner filed a timely motion seeking credit for time served and for leniency pursuant to I.C.R. 35(a-b). (Aug., pp.1-9.) She initially submitted information with her Rule 35 motion which detailed inconsistencies in her GAIN assessments and documents showing that she is a good candidate for probation or a rider. (Aug., pp.1-9.) Two weeks later, Ms. Connor submitted additional supplemental information in support of her motions documenting her health conditions, her positive behavior while incarcerated, and her completion of a self-improvement class. (Aug., pp.11-20.) On August 30, 2019, the district court denied the motions without a hearing. (Aug., pp.21-26.)

⁶ There appears to be a clerical error in the Judgment of Conviction. (Supp. R., p.154.) The Judgment reflects that Ms. Connor pled guilty to both the felony DUI and the persistent violator sentencing enhancement; however, the enhancement was either dismissed or never filed pursuant to the plea agreement. (3/19/19 Tr., p.61, Ls14-24.)

ISSUES

- I. Did the district court err when it denied Ms. Connor's motion to enlarge time to file suppression motions?
- II. Did the district court abuse its discretion when it imposed a unified sentence of ten years, with two and one-half years fixed, upon Ms. Connor following her plea of guilty to felony DUI?
- III. Did the district court abuse its discretion when it denied Ms. Connor's Idaho Criminal Rule 35 Motion?

ARGUMENT

I.

The District Court Erred In Denying Ms. Connor's Motion To Enlarge Time To File Suppression Motions

A. Introduction

Ms. Connor did not file her motion to suppress within the time limit designated by I.C.R. 12(d). Ms. Connor acknowledges that she was voluntarily absent from the State of Idaho for approximately five years. However, while she was gone, the Idaho Supreme Court decided a case which held that a forced blood draw absent a warrant was unconstitutional. Ms. Connor asserts that the change in the law making unconstitutional a warrantless blood draw applied directly to her case, and thus, good cause existed for enlarging the time for moving to suppress the evidence collected as the result of unlawful police action. Ms. Connor asserts that the application of a procedural rule should not defeat her ability to address a clear constitutional violation. Ms. Connor asserts that the district court failed to reach its decision by an exercise of reason and acted inconsistently with applicable law, when it denied her motion to enlarge the time for her to file suppression motions.

B. Relevant Rules And Standard Of Review

Idaho Criminal Rule 12 governs the filings of pre-trial pleadings and motions, generally, and motions to suppress evidence, specifically. I.C.R. 12(b)(3). Rule 12(d) governs the timelines for filing such motions and reads as follows:

Motions under Rule 12(b) must be filed within 28 days after the entry of a plea of not guilty or seven days before trial whichever is earlier. In felony cases, motions under 12(b) must be brought on for hearing within 14 days after filing or 48 hours before trial, whichever is earlier. *The court may shorten or enlarge the time and, for good cause shown or for excusable neglect, may relieve a party of failure to comply with this rule.*

I.C.R. 12(d) (emphasis added). The burden of showing good cause or excusable neglect is on the party who has missed the prescribed deadline. *State v. Gleason*, 130 Idaho 586, 591 (Ct. App. 1997). The power to extend or shorten the required time under I.C.R. 12(d) is discretionary. *State v. Alanis*, 109 Idaho 884, 888 (1985). When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry with four factors:

Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018). Constitutional claims are reviewed *de novo*. *State v. Easley*, 156 Idaho 214, 218 (2014).

C. The District Court Erred In Denying Ms. Connor’s Motion To Enlarge Time To File A Motion To Suppress Where Ms. Connor Demonstrated Good Cause Or Excusable Neglect

A district court can consider a late-filed motion, even with a busy calendar, if it finds good cause or excusable neglect for the late filing. *See State v. Alanis*, 109 Idaho 884, 888 (1985); *State v. Dice*, 126 Idaho 595, 597 (Ct. App. 1994). As explained by the Court of Appeals in *Dice* in addressing a late-filed motion to suppress:

The district court should have entertained an explanation by [defense] counsel for the delay [in filing a motion to suppress] and then should have determined whether good cause or excusable neglect was shown based on the reasons given. If no good cause or excusable neglect was established to the satisfaction of the district court, the motion should not have been heard.

126 Idaho at 597. Idaho Criminal Rule 12(d) requires motions to suppress to be filed “within 28 days after the entry of a plea of not guilty or seven days before trial whichever is earlier.” I.C.R. 12(d).

Ms. Connor's motion to suppress was filed in 2018, approximately five years after she failed to appear for a hearing in the case in 2013. (Supp. R., pp.40-41, 109.) In her memorandum in support of her motion to suppress, Ms. Connor asserted that, pursuant to *State v. Wulff*, 157 Idaho 416 (2014) (holding a warrant is required for a non-consensual blood draw), her blood was unlawfully drawn where she refused all testing and a warrant for a blood draw was never issued. (Supp. R., p.42.) Ms. Connor sought suppression of the blood draw test results. (Supp. R., p.42.)

The State objected to Ms. Connor's motion to suppress, asserting it was untimely filed under I.C.R. 12(e). (Supp. R., pp.72-75.) The State claimed that Ms. Connor had not shown good cause or excusable neglect for the late filing and asked the district court to deny the motion to suppress because it was untimely. (Supp. R., p.74.)

A hearing was held on Ms. Connor's motion. (Supp. R., pp.51-54; *see* 1/14/19 Tr.) Defense counsel asserted that the law changed with the United States Supreme Court decision in *Missouri v. McNeely*, 569 U.S. 141, 156 (2013), and the subsequent Idaho decision in *State v. Wulff*, 157 Idaho 416 (2014). (1/14/19 Tr., p.6, L.23 – p.7, L.16.) Defense counsel asserted that failure to find good cause or excusable neglect for the late filing would ignore Ms. Connor's constitutional rights in favor of a procedural rule. (1/14/19 Tr., p.16, Ls.2-6.) Ms. Connor's counsel asserted that the change in the law making unconstitutional her forced blood draw excused the late-filed motion to suppress as excusable neglect and/or good cause. (1/14/19 Tr., p.8, L.8 – p.9, L.23.) Ms. Connor's counsel agreed that, had the case proceeded to trial at the initial trial date, the law in Idaho permitted the officers to hold Ms. Connor down to draw her blood. (1/14/19 Tr., p.13, L.19 – p.14, L.2.) However, defense counsel asserted that Ms. Connor was entitled to the state of the law as it is when she is before the court. (1/14/19 Tr., p.14, Ls.12-

15.) Counsel asked the court “to follow the dictates of the Idaho Supreme Court and find that the blood draw was illegally obtained in violation of her constitutional rights and that the matter should be -- should be suppressed.” (1/14/19 Tr., p.15, Ls.5-9.)

After hearing the arguments of the parties, the district court found Ms. Connor’s motion to suppress was untimely filed, and no good cause or excusable neglect warranted extending the time. (Supp. R., pp.68-74.) The district court found that Ms. Connor did not show excusable neglect or good cause for failure to file the motion to suppression within the time set by I.C.R. 12(d). (1/14/19 Tr., p.19, Ls.22-25.) The district court found Ms. Connor voluntarily hid herself from the authorities and concluded that her failure to attend hearings or otherwise make herself available was not good cause or excusable neglect. (1/14/19 Tr., p.20, L.16 – p.21, L.3.) The district court held that “the failure to be available, the failure to be at trial or for a hearing pretrial, and being absent for the time period at issue here is not good cause nor excusable neglect.” (1/14/19 Tr., p.20, L.25 – p.21, L.3.)

Ms. Connor recognizes that there is no case law in Idaho that defines the meaning of “good cause” or “excusable neglect” as used in I.C.R. 12(d). However, Ms. Connor asserts that considerations that State action violated a defendant’s constitutional rights do constitute good cause to enlarge the time to hear a motion to suppress. Motions to suppress are the vehicle by which a defendant can keep illegally obtained evidence from being used against him or her. *See* I.A.R. 12(b)(3). During the pendency of Ms. Connor’s case, the United States Supreme Court decided *Missouri v. McNeely*, 569 U.S. 141 (2013) and the Idaho Supreme Court decided *State v. Wulff*, 157 Idaho 416 (2014).

In *Missouri v. McNeely*, the United States Supreme Court held that, “while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it

does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case on the totality of the circumstances.” 569 U.S. 141, 156 (2013). “In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.” *Id.* 569 U.S. at 152.

In *Wulff*, the Court recognized that, “*McNeely* repeatedly indicated that ‘[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.’” *Wulff*, 157 Idaho at 420 (quoting *McNeely*). The *Wulff* Court extrapolated from *McNeely*, reasoning that if there can be no *per se* exigency rule, nor can there be a *per se* consent rule; it then held that any consent implied by I.C. § 18-8002(1) can be withdrawn or revoked. 157 Idaho 416, 420-23 (2014). In so holding, the Court pointed out that such an interpretation of *McNeely* is consistent with prior Supreme Court precedent holding that consent must be voluntary, and the voluntariness of consent is a factual question (to be proved by the government), which must be analyzed under the totality of the circumstances. *See Wulff*, 157 Idaho at 422 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)).

The decision in *Wulff* makes clear that Ms. Connor’s blood was drawn in violation of her constitutional rights. (PSI, p.150; 1/14/19 Tr., p.15, Ls.5-9.) Ms. Connor asserts that where an opportunity for a full and fair hearing on the merits of an untimely motion to suppress can be held, where a ruling can be issued well before trial, and where doing so addresses a clear violation of the defendant’s constitutional rights, good cause has been shown. Thus, Ms. Connor asserts the district court abused its discretion in denying her motion to enlarge time to file her motion to suppress.

II.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Ten Years, With Two And One-Half Years Fixed, Upon Ms. Connor Following Her Plea Of Guilty To Felony DUI

Ms. Connor asserts that, given any view of the facts, her unified sentence of ten years, with two and one-half years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). In reviewing a trial court's decision for an abuse of discretion, the relevant inquiry regards four factors:

Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018).

Ms. Connor does not allege that her sentence exceeds the statutory maximum. Accordingly, in order to show the district court abused its discretion by failing to reach its decision by the exercise of reason, Ms. Connor must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *State v. Jackson*, 130 Idaho 293, 294 (1997). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

In light of the mitigating factors present in this case, Ms. Connor's sentence is excessive considering any view of the facts.

Ms. Connor had multiple traumatic events in her life when she made the decision to leave the country, failing to appear for her January 15, 2013 hearing in this case. (PSI, pp.17-18.) Ms. Connor's two youngest children had been led astray by people in the church and had inappropriate pictures taken of them online. (PSI, p.17.) Ms. Connor's eldest son was having a mental health emergency. (PSI, p.17.) Ms. Connor struggled to deal with these events, and made the decision to move the family to India to leave these problems behind. (PSI, p.17.) The rest of the family went back to the United States approximately six months after traveling to India with Ms. Connor. (PSI, p.17.)

Ms. Connor does have a supportive family to assist her in her rehabilitation. (PSI, p.14.) Ms. Connor has a good relationship with her adoptive mother and received a letter of support from her. (PSI, p.14.) Ms. Connor's eldest child is also supportive of her, and assisted her financially to come back to the United States. (PSI, p.18.) *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts).

Further, Ms. Connor expressed remorse and accepted responsibility for her actions. (1/29/19 Tr., p.40, L.20 – p.41, L.5; 3/19/19 Tr., p.89, Ls.8-10; p.92, Ls.11-14; PSI, p.5.) During her presentencing interview, Ms. Connor wrote that she was “ashamed at my lack of ability to correctly perceive my physical demeanor. Irresponsible.” (PSI, p.5.) At her sentencing hearing, Ms. Connor expressed regret and told the court how sorry she was for her actions. (3/19/19 Tr., p.89, Ls.8-10; p.92, Ls.11-14.) She told the court:

For me, the whole situation and my whole life is very embarrassing. I am very ashamed about everything.

...

So I agree – I thank Ms. Jameson as well because she could have been much harder on me with the persistent violator and with much harder sentencing recommendations. But I agree with her long-term of the indeterminate time because that’s going to give me a longer time to get myself in order, you know, and I – with, hopefully, with the help of Ocean Hills. But during that time, I know for a fact that I won’t be making any violations because I always follow it perfectly. So it will give me a longer time for me to, not just practice abstinence from alcohol, but to actually practice recovery this time. You know, before I was only abstaining, but now I will have a chance to learn some relapse prevention and some recovery.

(3/19/19 Tr., p.89, Ls.8-10; p.91, Ls.8-23.) Idaho recognizes that some leniency is required when a defendant expresses remorse for her conduct and accepts responsibility for her acts. *Shideler*, 103 Idaho at 595; *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

Based upon the above mitigating factors, Ms. Connor asserts that the district court abused its discretion by imposing an excessive sentence upon her. She asserts that had the district court properly considered her considerable remorse, substance abuse issues, and her family and community support, it would have imposed a less severe sentence.

III.

The District Court Abused Its Discretion When It Denied Ms. Connor’s Rule 35 Motion For A Sentence Reduction In Light Of The New Information Offered In Support Of Her Rule 35 Motion And In Failing To Consider Additional Information Submitted On August 8, 2019, In Support Of Her Rule 35 Motion

Although Ms. Connor contends that her sentence is excessive in light of the information in front of the district court at the time of her March 19, 2019 sentencing hearing (*see* Part II, *supra*), she asserts that the excessiveness of her sentence is even more apparent in light of the new information submitted in conjunction with her Rule 35 motion. Ms. Connor asserts that the district court’s denial of her motion for a sentence modification represents an abuse of discretion.

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. 1994). “The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable.” *Id.* “If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.*”

Rule 35 movants wishing to submit additional evidence should introduce evidence, either by affidavit or in the motion itself, to enable the district court to determine whether to hold an evidentiary hearing. (See *State v. Fortin*, 124 Idaho 323, 328 (Ct. App. 1993.) In ruling on a Rule 35 motion, a district court must make a “reasoned decision on whether to hold an evidentiary hearing. . . .” *Id.* The district court abuses its discretion in determining whether to hold a hearing on a motion for reduction of sentence without hearing testimony or oral argument if the court unreasonably refuses to consider relevant evidence or otherwise unduly limits the information considered. *State v. Bayles*, 131 Idaho 624, 626 (Ct. App. 1998); *State v. Izaguirre*, 145 Idaho 820, 824 (Ct. App. 2008).

Ms. Connor asserts that the district court abused its discretion by unduly limiting the information it considered when ruling upon her Rule 35 motion. By failing to consider the information contained in the August 8, 2019 filing submitted in support of the Rule 35 motion, the district court unreasonably refused to consider relevant evidence and unduly limited the information it considered. It is likely that the information contained in the supplemental materials filed on August 8, 2019 would have altered the decision of the district court to deny Ms. Connor’s Rule 35 motion.

In support of her motion for credit for time served and for a sentence reduction, Ms. Connor filed materials contemporaneously with her motion. (Aug., pp.1-9.) She asserted that there was a conflict in the GAIN assessment:

As highlighted in a letter dated June 10, 2019, from Correctional Case Manager Nicholas Hale (Exhibit A – 3 pages), these inconsistencies are critical as the District Court used the gain assessment in the reasoning for denial of probation. The court noted the gain assessment stated Ms. Connor had “no motivation for change.”

Further, the defendant would ask the court to consider information from the IDOC employees. (Exhibit B-D[.]) The information and documents support that Ms. Connor is a good candidate for probation or a RIDER.

(Aug., pp.1-2.)

On August 8, 2019, Ms. Connor *again* submitted new or additional information in support of her Rule 35 motion for leniency. The August 8, 2019 filing contained information regarding her medical condition, anemia, and the fact that the condition was not improving while she was incarcerated. (Aug., pp.11-20.) She submitted information regarding the self-improvement she was engaged in while incarcerated. (Aug., pp.11-12, 17-18.) Ms. Connor completed AA and was enrolled in Thinking for a Change and the Cognitive-Behavioral Interventions for Substance Abuse while in custody. (Aug., pp.11-12, 17-18.) She also completed a certification course for Medic First Aid-GY2015, which teaches Basic Plus CPR, First Aid, and AED for adults. (Aug., p.17.) Ms. Connor was hired to work off-site and had seven positive notes in her file documenting her volunteer work while incarcerated. (Aug., p.17.) In support of her motion for leniency, Ms. Connor submitted documentation revealing that she had been accepted for substance abuse treatment at a local aftercare facility. (Aug., pp.12, 19.)

In denying Ms. Connor's Rule 35 motion, the district court said it had considered Ms. Connor's Rule 35 motion filed on July 22, 2019, and it had considered Ms. Connor's criminal record and her unavailability from 2012 to 2018. (Aug., pp.21, 24-25.) The court concluded, "On the record as a whole, Defendant's request for leniency fails without any conflict in the GAIN assessment and without regard to how certain staff at IDOC currently observed her. (Aug., pp.24-25.) The court went on, "To the extent the alleged error in the GAIN creates an argument that the sentence was not lawfully imposed, this Court finds such error harmless." (Aug., p.25.) The district court denied Ms. Connor's Rule 35 motion, finding that Ms. Connor "has not shown an entitlement to leniency with respect to the sentence [the district court] lawfully imposed."⁷ (Aug., p.25.) The district court denied the Rule 35 motion, apparently considering only the information filed on July 22, 2019. However, this was erroneous where Ms. Connor filed supplemental materials on August 8, 2019. The information Ms. Connor submitted on August 8, 2019 in support of her Rule 35 motion was not considered by the district court before it denied the Rule 35 motion.

In *State v. Izaguirre*, 145 Idaho 820 (Ct. App. 2008), the Idaho Court of Appeals examined the question of whether a district court abused its discretion by unduly limiting the information when ruling on a Rule 35 motion. In that case, the district court denied the defendant's motion for a neurocognitive evaluation and declined to consider articles from professional journals on brain development that were submitted by the defendant in support of

⁷ The district court judge who sentenced Ms. Connor was not the same district court judge who ruled on her Rule 35 motion. (See Aug., p.25.) It appears that the district court who denied her Rule 35 motion believed she had been convicted of both the felony DUI and the persistent violator sentencing enhancement. (See Aug., p.23.) This was error, as identified in footnote 6 of this brief, Ms. Connor's plea agreement called for the prosecutor to dismiss the persistent violator sentencing enhancement. (2/19/19 Tr., p.61, Ls.23-24.)

his Rule 35 motion. The Idaho Court of Appeals found that the trial court erred in denying the Rule 35 motion and not ordering an evaluation because there was reason to suspect neurocognitive abnormalities. *Id.* at 823. The Court also found that the district court abused its discretion when it unduly limited the information it considered by refusing to review the articles on which the defendant partially based his Rule 35 motion. *Id.* at 824. The Idaho Court of Appeals reversed the order denying the motion for a neurocognitive evaluation, vacated the sentence and remanded the case for resentencing. *Id.* at 823.

The facts of Ms. Connor's case are similar to those in *Izaguirre* in that the district court did not consider the information submitted on August 8, 2019—information regarding Ms. Connor's medical condition, her self-improvement and commendable volunteer work, and her acceptance into a substance abuse treatment facility in the community—when it denied her Rule 35 motion.

Based on the foregoing, in addition to the mitigating evidence before the district court at the time of sentencing, it is clear that the district court abused its discretion in unduly limiting the information it considered before ruling on Ms. Connor's Rule 35 motion. Thus, the district court erred in failing to reduce her sentence or place her on probation pursuant to Ms. Connor's Rule 35 motion.

CONCLUSION

Ms. Connor respectfully requests that this Court vacate the district court's judgment and conviction and reverse the order which denied her motion to enlarge the time for her to file a suppression motion and remand with instructions that Ms. Connor be allowed to file any suppression motion deemed applicable. Alternatively, she requests that the order denying her Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 25th day of November, 2019.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of November, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

SJC/eas