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# State v. Smith Appellant's Reply Brief Dckt. 43706

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

BRIAN R. DICKSON  
Deputy State Appellate Public Defender  
I.S.B. #8701  
P.O. Box 2816  
Boise, ID 83701  
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 43706
	)	
v.	)	ADA COUNTY NO. CR 2015-3098
	)	
DANIEL JOSEPH SMITH,	)	APPELLANT'S
	)	REPLY BRIEF
Defendant-Appellant.	)	
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STATEMENT OF THE CASE

Nature of the Case

Daniel Smith appeals, contending the district court erred by denying his motion for appointment of counsel on his motion for leniency under I.C.R. 35 (*hereinafter*, Rule 35), and also by denying that motion on its merits. The State's response articulates and argues under the improper standard for determining whether the information presented with that motion is new and additional, as it relies on the standard for Rule 35 motions challenging a stipulated sentence. Since Mr. Smith did not agree to a stipulated sentence as part of his plea agreement, the standard articulated by the State is inapplicable, as the Court of Appeals has expressly refused to apply that standard beyond that narrow context. Under the appropriate standard of review, which considers

whether the district court had been previously presented with the information in question, Mr. Smith presented new and additional information with his motion. As such, it was not frivolous. Therefore, the district court erred in denying his motion for appointment of counsel on that motion and by denying that motion on its merits.

### Statement of Facts and Course of Proceedings

The statement of facts and course of proceedings were previously articulated in Mr. Smith's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

### ISSUE

Whether the district court erred when it denied Mr. Smith's Rule 35 motion without appointing counsel.

### ARGUMENT

#### The District Court Erred When It Denied Mr. Smith's Rule 35 Motion Without Appointing Counsel

A. When Applying The Proper Standard For New Or Additional Information, Mr. Smith's Motion Is Not Frivolous, And So, He Should Have Been Appointed Counsel

As an initial matter, the State characterizes Mr. Smith's information in support of his Rule 35 motion as only reiterating the points he made at the sentencing hearing. (Resp. Br., p.3.) That argument is contradicted by the record, which shows that the information – most notably, the information that, once Mr. Smith was informed of his HIV diagnosis, he had taken efforts to reduce his risk of spreading that disease – was not presented at sentencing. (*Compare R.*, p.142 (Mr. Smith's assertion of this information

in his Rule 35 motion), *with* Tr., p.12, L.5 - p.15, L.19 (the defense's comments at the sentencing hearing, not mentioning Mr. Smith's diagnosis at all.) Had that information been presented, the district court could not have justifiably reached the conclusion it did, that Mr. Smith had knowingly exposed people to that condition in the year before he learned of his condition. (See Tr., p.18, Ls.13-19 (the district court stating, "I found myself wondering . . . how many others were affected by this reckless behavior").) Therefore, Mr. Smith's Rule 35 motion was accompanied by information that had not previously been presented to the district court. In fact, the State appears to subsequently concede that point as its entire argument in regard to Mr. Smith's motion for appointment of counsel is based on the premise that the information was not "new" because Mr. Smith was aware of it at the time of the sentencing hearing (implying that he should have presented it at that hearing). (See Resp. Br., pp.3-4.)

Given the State's apparent concession, the only question on appeal is whether the information accompanying the Rule 35 motion, which to that point, had not been presented to the district court, constituted "new or additional" information in support of the motion. The State asserts the standard to evaluate that question is that the new or additional information has to be information "that was not available at the time of sentencing." (Resp. Br., pp.3-4 (emphasis omitted).) It cites *State v. Wade*, 125 Idaho 522, 526 (Ct. App. 1994), as the source for that standard. (Resp. Br., p.3.) However, that misrepresents the narrow scope of the *Wade* standard. *Wade* applies only to the limited scenario where a Rule 35 motion is requesting leniency from a stipulated sentence. *State v. Person*, 145 Idaho 293, 299 (Ct. App. 2007).

In *Person*, the Court of Appeals made it clear that the *Wade* standard was a product of the contractual concerns surrounding plea agreements for stipulated sentences:

It is not only the prosecutor who is bound by a plea agreement—a defendant is also obligated to adhere to its terms, and the state is entitled to receive the benefit of its bargain. Therefore, in *State v. Wade*, . . . we further stated that the defendant’s Rule 35 motion could have merit only if it were justified by new or additional information that was not available *when the plea bargain was made*.

*Person*, 145 Idaho at 299 (internal citation omitted) (emphasis added). In the traditional Rule 35 scenario, where the defendant is requesting leniency from a sentence to which he did not stipulate, the evaluation of “new or additional” information is focused on whether the district court judge was aware of the information attached to the Rule 35 motion. See, e.g., *State v. Torres*, 107 Idaho 895, 898 (Ct. App. 1984) (holding a change in judicial personnel does not prevent the defendant from presenting information in support of his Rule 35 motion which was not available to the sentencing judge); see also *State v. Huffman*, 144 Idaho 201, 203 (2007) (discussing the standard for “new or additional” information in terms of information “provided to the district court”).

Thus, it is specifically because of the contractual concerns in the stipulated-sentence scenario that the focus understandably shifts to whether the defendant was aware of that information at the time of the plea agreement. *Person*, 145 Idaho at 299; see also *State v. Holdaway*, 130 Idaho 482, 485 (Ct. App. 1997). In that scenario, the district court is simply ratifying the sentence the parties agreed to. Accordingly, the focus of the Rule 35 evaluation in that context is on the information the defendant had because any information the defendant had must have been taken into account in his decision to enter that agreement. As a result, to show that sentence is excessive, he

must necessarily present evidence that had not factored into the sentence imposed. It is upon this very point that the *Wade* decision itself turned: the information at issue in that case was “information which was in the possession of Wade and his counsel and presumably weighed by them *in considering the sentence to which Wade agreed.*” *Wade*, 125 Idaho at 526 (emphasis added).

However, those same concerns do not exist in the traditional Rule 35 scenario. Rather, it is the information presented to the district court that factors into the sentence the district court is crafting. Thus, the focus is properly on the information of which the district court was aware in that scenario. Accordingly, the Court of Appeals has expressly rejected the State’s argument in the traditional Rule 35 scenario: “we respectfully disagree with Judge Swanstrom’s dissenting opinion . . . , in which he argues that a Rule 35 motion must rest upon information which was not, and could not have been presented at sentencing. Our cases do not support such a cramped view of Rule 35, and we decline to adopt it today.” *State v. Bonaparte*, 114 Idaho 577, 582 (Ct. App. 1988), *overruled on other grounds as stated in State v. Larson*, 158 Idaho 130, 135-36 (Ct. App. 2014). As the Court of Appeals has made plain, “It would ill serve the purpose of a Rule 35 motion to preclude the defendant from presenting fresh information about himself or his circumstances.” *Torres*, 107 Idaho at 898.

The Idaho Supreme Court uses this same standard. In *State v. Wersland*, for example, the Supreme Court held that information regarding the defendant’s mental health treatment *two years prior to the sentencing hearing* was “new” information which justified a sentence reduction under Rule 35. *State v. Wersland*, 125 Idaho 499, 504-05 (1994). Similarly, in *State v. Arthur*, the Supreme Court held that information regarding

the defendant's ongoing treatment for a terminal illness was "additional" information which justified a sentence reduction under Rule 35. *State v. Arthur*, 145 Idaho 219, 223 (2008). In both cases, the information which justified the sentence reduction was obviously information the defendant could have been aware of and presented at the initial sentencing hearing. Nevertheless, it fulfilled the requirement reaffirmed in *Huffman*<sup>1</sup>: "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." *Huffman*, 144 Idaho at 203 (emphasis added).

As such, the proper standard in the traditional Rule 35 scenario is: if the district court did not have the information at sentencing, it is new or additional information and is sufficient to support a Rule 35 motion. Only in the extraordinary circumstance where the defendant is challenging a stipulated sentence does that focus change.

Mr. Smith did not bargain for a stipulated sentence. (See Tr., p.6, Ls.3-11 (noting the plea agreement only called for a particular sentence recommendation from the State on one of the charges; the agreement allowed for "*open arguments*" on the second) (emphasis added); *accord*. Entry of Plea Tr., p.7, L.24 - p.9, L.4 (the parties articulating the terms of the plea agreement); *see also* Tr., p.14, Ls.7-24 (defense counsel arguing for a sentence more lenient than the one the prosecutor recommended).) Therefore, this is a traditional Rule 35 scenario, and so, the *Wade* standard is inapplicable. The proper analysis focuses on whether the information Mr. Smith attached to his Rule 35 motion had previously been presented to the district court. Since, as discussed *supra*, it

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<sup>1</sup> *Arthur* had actually been suspended pending the decision in *Huffman*, and so, expressly applied the standard as rearticulated by *Huffman*. *Arthur*, 145 Idaho at 223.

was not (and since the State's argument appears to concede that point), the information accompanying Mr. Smith's motion is "new or additional" information. As a result, his Rule 35 motion was not frivolous. Therefore, as discussed in depth in the Appellant's Brief, pages 5-11, the district court erred by denying Mr. Smith's request for counsel on his Rule 35 motion.

Furthermore, the State does not respond to Mr. Smith's point, that one of the reasons counsel should be appointed pursuant to I.C. § 19-852 in such cases is to help a defendant marshal and present all the relevant information, as a defendant acting *pro se* may not be aware of, or able to obtain, all the relevant information. (See App. Br., pp.9-11; see *generally* Resp. Br.) Therefore, if the only question is whether the information the defendant has is sufficient to meet the threshold standard for Rule 35 motions, counsel should still have been appointed. If the State's argument to the contrary is endorsed, it allows the district court to deny a request for counsel because it has already decided to deny the motion on its merits. Such a position is, as the Idaho Supreme Court has explained, untenable. (See App. Br., pp.9-11 (discussing the Supreme Court's precedent on this point in depth).)

Since Mr. Smith presented a non-frivolous Rule 35 claim supported by new or additional information which had not, to that point, been presented to the district court, the district court erred in denying his motion for appointment of counsel.

B. The District Court Abused Its Discretion By Denying Mr. Smith's Rule 35 Motion

The State's responses concerning the district court's ruling on the merits of Mr. Smith's Rule 35 motion are not remarkable, and as such, no further reply is



necessary in regard to those issues. Accordingly, Mr. Smith simply refers the Court back to pages 12-13 of his Appellant's Brief.

CONCLUSION

Mr. Smith respectfully requests that this Court vacate the order denying his Rule 35 motion and that it remand this case to the district court for further proceedings following appointment of counsel. Alternatively, he requests this Court reduce his sentence as it deems appropriate, or else, vacate the order denying his Rule 35 motion and remand the case for further proceedings.

DATED this 14<sup>th</sup> day of July, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
BRIAN R. DICKSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14<sup>th</sup> day of July, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

DANIEL JOSEPH SMITH  
INMATE #69623  
NCWC  
1640 11TH AVENUE NORTH  
NAMPA ID 83687

SAMUEL A HOAGLAND  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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

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

BRD/eas