



Conflict Counsel”, “Affidavit of Steve A. Cherry in Support of Motion to Appoint Conflict Counsel” and “Declaration of Brian E. Houge.”

On December 17, 1997, following a jury trial, Cherry was sentenced by Judge James F. Judd to a fixed life sentence in prison (meaning the life sentence precluded the possibility of parole) for killing his girlfriend, Susan Foutz. Defendant’s Memorandum of Law in Support of Defendant’s I.C.R. Rule 35(a) Motion to Correct an Illegal Sentence, p. 2.

For reasons apparent below, Cherry’s various motions must be discussed in a particular order.

## **II. MOTION TO DISQUALIFY.**

Cherry’s “Defendant’s Motion for Disqualificaiton of Judge Without Cause” must be discussed first. I.C.R. 25(e). Cherry cites to I.C.R. 25(a) as the basis for this motion.

Cherry’s motion must be denied as it is untimely.

Idaho Criminal Rule 25(a)(2) provides:

2) Time for filing. A motion for disqualification without cause must be filed not later than seven (7) days after service of a written notice setting the action for status conference, pre-trial conference, trial or for hearing on the first contested motion, or not later than fourteen (14) days after the service of a written notice specifying who the presiding judge or magistrate to the action will be, whichever occurs first; and such motion must be filed before the commencement of a status conference, a pre-trial conference, a contested proceeding or trial in the action.

On November 21, 2001, the undersigned judge succeeded Judge Judd following his retirement. In the years since, Cherry has known the undersigned judge has been assigned to his criminal case and his post-conviction relief case. In this criminal case (Kootenai County Case No. CRF 1996 2624) the most recent order by the undersigned judge was on March 28, 2013, when this Court filed its Memorandum Decision and Order Denying Defendant’s “Motion to Vacate Conviction and Sentence Pursuant to I.C. § 19-

2406 and Clearly Established Laws.” There have been other notices to Cherry prior to that order, that the undersigned judge was assigned to his criminal case. Cherry had seven days after he first received notice that the undersigned was assigned to his case, within which to file a motion to disqualify without cause. I.C.R. 25(a)(2). That seven-day period expired, at a minimum, more than two years ago when Cherry received a copy of that March 28, 2013, decision and order. Accordingly, Cherry’s “Defendant’s Motion for Disqualificaiton of Judge Without Cause” is denied as it is untimely.

### **III. MOTION FOR APPOINTMENT OF COUNSEL.**

Cherry has requested appointment of counsel to help him prosecute his I.C.R. 35 Motion. For reasons set forth below in Section IV, this Court finds Cherry’s I.C.R. 35 Motion to be frivolous. Because Cherry’s I.C.R. 25 Motion is frivolous, this Court denies Cherry’s Motion for Appointment of Counsel.

The Idaho Court of Appeals has held:

A criminal defendant has a right to counsel at all critical stages of the criminal process, including pursuit of a Rule 35 motion. I.C. §§ 19-851, 19-852; I.C.R. 44; *Murray v. State*, 121 Idaho 918, 923 n. 3, 828 P.2d 1323, 1328 n. 3 (Ct.App.1992). Although a defendant has an absolute right to retained counsel in a Rule 35 proceeding, appointed counsel at this stage may be denied if the trial court finds that the motion “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(b)(3). Thus, a defendant may be denied appointment of counsel to assist in pursuing a Rule 35 motion if the trial court finds the motion to be frivolous.

When a court is presented with a request for appointed counsel, the court must address that request before rendering a ruling on the substantive issues in the underlying case. *Henderson v. State*, 123 Idaho 51, 53, 844 P.2d 33, 35 (Ct.App.1992). In this case the district court did not act upon Wade’s request for an attorney before issuing its original order denying Rule 35 relief. Thus, unless the district court remedied this error before losing jurisdiction, remand will be necessary.

*State v. Wade*, 125 Idaho 522, 525-24, 873 P.2d 167, 168-69 (Ct. App. 1994). Again, for reasons set forth immediately below, this Court finds Cherry's I.C.R. 35 Motion to be frivolous, and thus, denies Cherry's motion to have counsel appointed to assist him in prosecuting that motion.

#### **IV. IDAHO CRIMINAL RULE 35 MOTION.**

Cherry's I.C.R. 35 Motion states Cherry, "moves this Court to vacate the imposition of sentence in this matter based upon the grounds that the Court illegally imposed the aforementioned sentence in this matter because Mr. Cherry was not competent to be sentenced or punished in this case because he lacked the capacity to assist in his own defense." Defendant's I.C.R. Rule 35(a) Motion to Correct an Illegal Sentence, p. 1. Cherry submits the Declaration of Brian E. Hogue in support of that motion. Hogue testifies that he is an inmate at Idaho Correctional Institution in Orofino, Idaho, along with Cherry, and that based upon Hogue's observations Cherry, *at the present time*, lacks the ability to assist Hogue in preparing the filings that have been submitted to the court. Hogue provides no testimony as to Cherry's ability to assist counsel at the time of sentencing, which occurred on December 16, 1997. Thus, Hogue's affidavit is of no relevance.

Cherry's "Affidavit of Steve A. Cherry in Support of Motion to Appoint Conflict Counsel" discusses his claimed competency at the time of sentencing. Ignoring the lack of credibility of Cherry's affidavit resulting from Hogue's affidavit which states Cherry is currently not competent, there is a more substantive problem here. Cherry makes his motion pursuant to I.C.R. 35(a), yet ignores that such rule is limited to correcting "a sentence that is illegal from the face of the record..." The rule reads: "The court may

correct a sentence that is illegal from the face of the record at any time.” I.C.R. 35(a). If Cherry claims his life sentence was illegal “from the face of the record”, then why would Cherry submit affidavits? Idaho Criminal Rule 35(a) allows correction when it is a matter of law, or when the facts are not in dispute from the face of the record. An example is when a judge imposes a sentence which exceeds the statutory maximum for a given crime to which a defendant has plead guilty or has been found guilty by a jury. Cherry’s fixed life sentence is within the statutory maximum for the felony crime of first degree murder, I.C. § 18-4003(a). For this Court to have the ability “at any time” to correct Cherry’s alleged illegal sentence, that illegality must be “apparent from the face of the record.”

The Supreme Court of the State of Idaho quite clearly discussed in detail the meaning of “apparent from the face of the record”:

**A. A trial court cannot examine the underlying facts of a crime to which the defendant pled guilty to determine if the sentence is an “illegal sentence” under Rule 35.**

Idaho Criminal Rule 35 provides, in pertinent part: “The court may correct an illegal sentence at any time and may correct a sentence that has been imposed in an illegal manner within the time provided herein for the reduction of sentence.” The term “illegal sentence” is not defined under Rule 35. “Where the lower court’s decision turns on the interpretation of a criminal rule, this Court exercises free review.” *State v. Castro*, 145 Idaho 173, 175, 177 P.3d 387, 389 (2008).

Idaho Criminal Rule 35 was adopted from Federal Rule of Criminal Procedure 35, which originally read: “The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.” Fed.R.Crim.P. 35 (1944). “[Federal Rule of Criminal Procedure 35] ‘was a codification of existing law and was intended to remove any doubt created by the decision in *United States v. Mayer*, 235 U.S. 55, 67, 35 S.Ct. 16, 18, 59 L.Ed. 129 [135] [(1914)], as to the jurisdiction of a District Court to correct an illegal sentence after the expiration of the term at which it was entered.’ ” *Hill v. United States*, 368 U.S. 424, 430 n. 8, 82 S.Ct. 468, 472 n. 8, 7 L.Ed.2d 417, 422 n. 8 (1962) (quoting *Heflin v. United States*, 358 U.S. 415, 422, 79 S.Ct. 451, 455, 3 L.Ed.2d 407, 411–12 (1959) (Stewart, J., concurring)). The United States Supreme Court has explained that the function of Fed.R.Crim.P. 35 is narrow: “[A]s the Rule’s language and

history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence.” *Hill*, 368 U.S. at 430, 82 S.Ct. at 472, 7 L.Ed.2d at 422.

A number of state court jurisdictions have narrowed review of a motion to correct an illegal sentence, concluding that the determination of whether a sentence is illegal for purpose of the motion is a legal question, and does not permit an evidentiary inquiry. For example, the Florida Supreme Court addressed whether an unsworn motion that alleged a sentencing error and requested a factual determination of the number of criminal episodes actually alleged an “illegal” sentence that could be resolved at any time. *State v. Callaway*, 658 So.2d 983, 984 (Fla.1995), *receded from on other grounds by Dixon v. State*, 730 So.2d 265 (Fla.1999). The Florida Supreme Court limited the definition of “illegal sentence” to include only “those sentencing issues that can be resolved as a matter of law without an evidentiary determination,” i.e. sentencing issues that can be determined from the face of the record. *Id.* at 984.

The Indiana Supreme Court similarly held that an evidentiary inquiry is not permitted for a defendant's motion to correct an “erroneous sentence,” under Indiana Code § 35–38–1–15. *Robinson v. State*, 805 N.E.2d 783, 787 (Ind.2004). The Indiana Supreme Court stated:

When claims of sentencing errors require consideration of matters outside the face of the sentencing judgment, they are best addressed promptly on direct appeal and thereafter via post-conviction relief proceedings where applicable. Use of the statutory motion to correct sentence should thus be narrowly confined to claims apparent from the face of the sentencing judgment, and the “facially erroneous” prerequisite should henceforth be strictly applied, notwithstanding *Jones*, *Reffett*, and *Mitchell*. We therefore hold that a motion to correct sentence may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of the statutory authority. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct sentence.

*Id.* (emphasis added). In sum, the Indiana Supreme Court employs a “facially erroneous” standard to determine whether a sentence is illegal.

Likewise, the Wyoming Supreme Court has limited the definition of “illegal sentence” to “one that exceeds statutory limits, imposes multiple terms of imprisonment for the same offense, or otherwise violates constitutions or the law.” *Brown v. State*, 99 P.3d 489, 491 (Wyo.2004). This definition is akin to the United States Supreme Court's definition of “illegal sentence” in *Hill v. United States*, 368 U.S. 424, 430, 82 S.Ct. 468, 472, 7 L.Ed.2d 417, 422 (1962), which, as noted above, focuses on correcting illegal sentences, not reexamining errors from proceedings prior

to sentencing. In *Brown*, the Wyoming Supreme Court held that “[t]he determination of whether a sentence is illegal is made by reference to the authorizing statute or applicable constitutional provisions and is, therefore, a matter of statutory interpretation.” *Brown*, 99 P.3d at 491. Therefore, in Wyoming the determination of whether a sentence constitutes an “illegal sentence” is a legal question that does not require an evidentiary hearing.

Therefore, the 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. See *State v. Arthur*, 145 Idaho 219, 223, 177 P.3d 966, 970 (2008).

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Therefore, we hold that the interpretation of “illegal sentence” under Rule 35 is limited to sentences that are illegal from the face of the record, i.e., those sentences that do not involve significant questions of fact nor an evidentiary hearing to determine their illegality.

*State v. Clements*, 148 Idaho 82, 84-87, 218 P.3d 1143, 1145-48 (2009). In Cherry’s present motion, the factual issue of Cherry’s lack of competency at the time of trial must be “apparent from the face of the record”, and it is not. Thus, Cherry’s I.C.R. 35 Motion is denied.

#### **V. ORDER.**

**IT IS HEREBY ORDERED** that defendant Cherry’s Motion for Disqualification of Judge Without Cause is DENIED.

**IT IS FURTHER ORDERED** that defendant Cherry’s Motion to Appoint Conflict Counsel is DENIED.

**IT IS FURTHER ORDERED** that defendant Cherry’s I.C.R. Rule 35(a) Motion to

Correct an Illegal Sentence is DENIED.

Dated this 10<sup>th</sup> day of June, 2015.

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John T. Mitchell, District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of June, 2015 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail to:

STEPHEN A. CHERRY  
IDOC: 53316  
381 W. Hospital Drive  
Orofino, ID 83544

Kootenai County Prosecuting Attorney

**CLERK OF THE DISTRICT  
COURT KOOTENAI COUNTY**

By: \_\_\_\_\_  
Deputy