

FILED _____

AT _____ O'clock ___ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
)
Plaintiff,)
)
vs.)
)
JASON CURTIS MCGOVERN)
DOB: 06-14-76)
SSN: 519-11-1609)
IDOC: 98832)
)
Defendant.)

Case No. **CRF 2010 10620**

**ORDER GRANTING I.C.R. 35
MOTION AND NOTICE OF
RIGHT TO APPEAL**

On December 7, 2010, McGovern, was sentenced, to wit:

**POSSESSION OF SEXUALLY EXPLOITATIVE MATERIAL (A FELONY),
Idaho Code § 18-1507, 18-1507A, committed on July 10, 2007 – to the
custody of the Idaho State Board of Correction for a fixed TWO (2)
years followed by an indeterminate term of FOUR (4) years, for a total
term not to exceed SIX (6) years.**

The Court sent McGovern on a period of retained jurisdiction. The Idaho Code sections, Idaho Code §18-1507 and §18-1507A, were taken by the Court directly from the Information filed by counsel for the plaintiff, State of Idaho on July 22, 2010. At no time subsequent, until August 19, 2016, has any party complained about the language in the Information or in the Court's various judgments.

After completing his period of retained jurisdiction, the Court placed McGovern on five years of supervised probation on May 17, 2011. McGovern violated his probation, and on October 15, 2014, this Court again placed McGovern on a second period of retained jurisdiction. On August 4, 2015, due to poor performance by McGovern in

prison, this Court relinquished jurisdiction and imposed the above sentence referencing the same Idaho Code sections. Retained Jurisdiction Disposition and Notice of Right to Appeal, pp. 1-2.

On August 19, 2016, McGovern, through counsel, filed the instant “Motion to Correct Illegal Sentence” pursuant to I.C.R. 35(a). That Motion contained briefing. To date, the plaintiff, State of Idaho has not responded to the Motion. On September 7, 2016, McGovern filed a Notice of Hearing noticing up his Motion for oral argument on October 26, 2016.

In his Motion, McGovern is requesting that the court correct an illegal sentence. McGovern correctly notes that Idaho Code §18-1507 and §18-1507A, as they were organized in 2010 (those two statutes were later changed in 2012), concern two different crimes. Idaho Code §18-1507 as it existed in 2010 made sexual exploitation of a child for commercial purposes a felony, and I.C. § 18-1507A as it existed in 2010 made sexual exploitation for non-commercial purposes a felony. The caption of I.C. § 18-1507A in 2010 read, “POSSESSION OF SEXUALLY EXPLOITATIVE MATERIAL FOR OTHER THAN A COMMERCIAL PURPOSE—PENALTY.” Understandably, the maximum penalty for a violation of I.C. § 18-1507A was less than that for a violation of I.C. § 18-1507. The Information filed by counsel for the plaintiff, State of Idaho on July 22, 2010, alleged both Idaho Code sections, but then used the following language to describe the conduct committed by McGovern:

That the Defendant, **JASON CURTIS McGOVERN**, on or about the 10th day of July, 2007, in the County of Kootenai, State of Idaho, did knowingly and willfully have in his possession material sexually exploiting a child under the age of eighteen years, for other than a commercial purpose, to wit: eighty-six (86) computer files containing photographs of prepubescent minors engaged in sexually explicit conduct, including oral-genital contact, genital-vaginal contact, genital-vaginal penetration, and genital-anal penetration of prepubescent minors by adult males, all of which is contrary to the form, force and effect of the statute in such case made

and provided and against the peace and dignity of the People of the State of Idaho.

Information, pp. 1-2. Thus, the text of the Information *only* alleged facts which would constitute a violation of I.C. §18-1507A and specifically *did not* allege facts which would constitute a violation of I.C. §18-1507 as those statutes were written at the time.

McGovern's Motion must be granted.

Idaho Criminal Rule 35 provides in part that:

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 court may reduce a sentence within 120 days after the filing of a judgment of conviction or within 120 days after the court releases retained jurisdiction. The court may also reduce a sentence upon revocation of probation or upon motion made within fourteen (14) days after the filing of the order revoking probation.

The sentence imposed on December 7, 2010, was illegal to the extent it referenced I.C. § 18-1507.

As mentioned above, McGovern has requested a hearing. A motion to modify a sentence "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." I.C.R. 35; *see State v. Copenhagen*, 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James*, 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct.App. 1986) (it is the defendant's burden to present any additional evidence and the court cannot abuse its discretion in "...unduly limiting the information considered in deciding a Rule 35 motion"); *State v. Puga*, 114 Idaho 117, 118, 753 P.2d 1263, 1264 (Ct.App. 1987). Even though a hearing was requested, "[t]he decision whether to conduct a hearing on an I.C.R. 35 motion to reduce a legally-imposed sentence is directed to the sound discretion of the district court." *State v. Peterson*, 126 Idaho 522, 525, 887 P.2d 67, 70 (Ct.App. 1994);

citing State v. Findeisen, 119 Idaho 903, 811 P.2d 513 (Ct.App. 1991). The Court has reviewed the “Motion to Correct Illegal Sentence” pursuant to I.C.R. 35(a), and has determined that it must be granted. There is nothing that could be presented at a hearing that would be of benefit to the Court. A hearing would only waste counsel and the Court’s time.

The sentence imposed on December 7, 2010, should not have referenced I.C. § 18-1507, and to that extent only, it is an illegal sentence. McGovern’s “Motion to Correct Illegal Sentence” pursuant to I.C.R. 35(a) must be granted. The appropriate remedy is to file an Amended “Retained Jurisdiction Disposition and Notice of Right to Appeal” to replace the order filed August 4, 2015. A copy of that Order is attached.

IT IS THEREFORE ORDERED that McGovern's McGovern’s “Motion to Correct Illegal Sentence” pursuant to I.C.R. 35(a) is **GRANTED**. The hearing scheduled for October 26, 2016, is **VACATED**.

NOTICE OF RIGHT TO APPEAL

YOU, JASON CURTIS MCGOVERN, ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an appeal, you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer, if any.

DATED this 21st day of September, 2016.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of September, 2016 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - Dennis Reuter
Prosecuting Attorney -

Idaho Department of Correction
Records Division (certified copy)
Fax: (208) 327-7445

JASON CURTIS MCGOVERN
IDOC # 98832

Probation & Parole

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy