

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 SHOSHONE**

STATE OF IDAHO,)
)
) Plaintiff,)
)
 vs.)
)
) REID L. YERGLER)
) DOB:)
) SSN:)
) IDOC: 103618)
)
) Defendant.)
)
 _____)

Case No. **CRF 2011 2721**

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

On May 16, 2012, Reid L. Yergler, was sentenced, to wit:

**SEXUAL ABUSE OF A CHILD UNDER THE AGE OF SIXTEEN YEARS,
(A FELONY) I.C. § 18 1508 – To the custody of the State of Idaho Board
of Correction for a fixed sentence of FIVE (5) years followed by an
indeterminate sentence of TWENTY (20) years for a total unified
sentence of TWENTY-FIVE (25) years.**

The Court imposed a period of retained jurisdiction on that day, and the Judgment (Sentencing Disposition and Notice of Right to Appeal) specifically stated the following, recommendation: “Needs sex offender assessment group, needs as much cognitive restructuring (cognitive self-change at a minimum) as possible.” Sentencing Disposition and Notice of Right to Appeal, p. 2. It also stated: “Needs additional polygraph testing to show no other victims & complete disclosure.” *Id.* At sentencing, the Court had available a polygraph evaluation by M. Jordan Ferguson, dated April 19, 2012, in which Yergler disclosed that at his mother’s day care, which was also Yergler’s home, Yergler had

sexually touched his five-year-old female victim, digitally penetrating her vagina, stopped when she said “ouch”, but did not disclose the following (which he did disclose to Thomas J. Hearn in the May 3, 2012, sex offender evaluation: that he had asked his five-year-old victim if she wanted to touch his penis, and while the five year old girl touched his penis, he asked her if she wanted to kiss his penis, to which she said “yes” but only after Yergler gave her a shoulder ride. It was due to that omission, which the Court found quite significant, that the Court ordered Yergler at sentencing: “Needs additional polygraph testing to show no other victims & complete disclosure.” The Court simply could not understand how Yergler could give such an obviously incomplete disclosure to the polygraph expert, yet still test as showing “no deception.”

On December 5, 2012, Yergler returned from his retained jurisdiction, and did so without any additional polygraph testing being conducted by the Idaho Department of Correction while he was on the retained jurisdiction program, nor had he obtained his own additional polygraph while at the county jail awaiting his jurisdictional review hearing. Because Yergler did not do what the Court directed him to do on May 2, 2012, the Court relinquished jurisdiction.

On December 12, 2012, Yergler filed his “Rule 35 Motion to Reconsider”, requesting “...this Court to reconsider its Order relinquishing jurisdiction,” and noted Yergler had also filed “...*another* polygraph report dated 12/10/12.” Rule 35 Motion to Reconsider, p. 1. (*italics in original*). On March 12, 2013, a hearing was held on Yergler’s I.C.R. 35 Motion. Yergler participated in that hearing telephonically from prison. At the conclusion of that hearing the Court stated that it was denying Yergler’s I.C.R. 35 Motion because the new polygraph had only served to confuse matters. This is because on April 19, 2012, Yergler tested as not being deceptive to an obviously incomplete disclosure, and on December 10, 2012, tested as not being deceptive to a more complete

disclosure. At the conclusion of that March 12, 2013, hearing, the Court stated that the Court was not willing to grant the Rule 35 relief at this time, but was willing to revisit this at some later point in time. In doing so, this Court wanted to give Yergler and his attorney and his experts the opportunity to clarify the confusion that the two reports created. No objection was made by the deputy prosecuting attorney to that invitation.

An Order denying Yergler's I.C.R. 35 Motion was prepared by the deputy prosecuting attorney, presented to the Court, signed and filed by the Court on March 19, 2013. That Order denied Yergler's I.C.R. 35 Motion and did not contain the language about the Court's willingness to revisit the issue.

On March 18, 2013, Yergler filed a "Notice of Hearing" scheduling oral argument on his "Motion to Re-Open" for April 2, 2013. However, the "Motion to Re-Open" itself was not filed until April 1, 2013. At the April 2, 2013, hearing, the deputy prosecuting attorney raised concerns as to whether the Court had jurisdiction to re-open the Rule 35 hearing due to the prohibition on successive motions. At the April 2, 2013, hearing, Yergler presented Exhibit A, a letter from his polygraph expert that, to some limited extent, explained the confusion between the incomplete disclosure polygraph on the April 19, 2012, where Yergler tested as not being deceptive and the complete disclosure polygraph on December 10, 2012, where Yergler tested as not being deceptive to a more complete disclosure. Jordan Ferguson's explanation was that the April 19, 2012, polygraph was focused more on other prior acts and not as much on the details of the acts underlying this offense. The Court did not have the opportunity to fully digest Exhibit A, and asked the attorneys to brief the issue of jurisdiction by April 9, 2013, and rescheduled the hearing for May 1, 2013. On April 8, 2013, the State filed "State's Brief Opposing Motion to Reopen." On April 9, 2013, Yergler filed "Defendant's Argument Re: Motion to Re-Open." On April 12, 2013, Yergler filed another brief entitled: "Brief in

Support of Defendant's Motion to Re-Open." The Court has read those briefs and on May 1, 2013, heard oral argument.

The State's brief cites I.C.R. 35 and case law. Yergler's brief does not. The State is correct that once a motion under I.C.R. 35 is denied, the sentencing court does not have the opportunity to reconsider such denial. *State v. Bottens*, 137 Idaho 730, 732-733 (Ct.App. 2002). State's Brief Opposing Motion to Reopen, p. 2.

Idaho Criminal Rule 35 speaks to a reduction of sentence, and this case deals with relinquishment of jurisdiction. *State v. Knutsen*, 138 Idaho 918, 923, 71 P.3d 1065, 1070 (Ct.App. 2003), makes it clear that I.C.R. 35 can be used to ask a court to reconsider its decision to relinquish jurisdiction.

However, this Court finds it has jurisdiction to hear and conclude Yergler's Rule 35 Motion for two reasons. First, this Court finds that what has actually occurred is more along the lines of a continuation of the March 12, 2013, hearing, and not a reconsideration of the denial of the Rule 35 motion and not a reopening of that motion or of the denial of that motion. This is because the Court specifically stated, at the end of the March 12, 2013, hearing, that it was willing to revisit this at some later point in time. The Court should have simply continued the hearing and did not. This Court erred in doing so. Clearly this Court wanted to give Yergler the opportunity to see if he could clarify his expert's opinions, which seemed to be in conflict. This Court finds it has jurisdiction to hear Yergler's Rule 35 Motion, consider the evidence presented on April 2, 2013, hearing, and make a final decision on such. Second, this Court still has jurisdiction to make a decision to relinquish in the first instance, under I.C. § 19-2601, as sentence was imposed on May 16, 2012, and this decision is issued on May 2, 2013.

Idaho Criminal Rule 35 provides in 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 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 May 16, 2012, is within the range of lawful sentences for the crime for which sentence was imposed. Yergler has failed to suggest any basis for determining that the imposed sentence is an illegal sentence. Since it is a legal sentence, under I.C.R. 35, the 120-day time period applies. Yergler's motion is timely.

Yergler has explained the inconsistency in his polygraph evaluations. Yergler's Addendum to the Presentence Report (the jurisdictional review report) recommended probation. This Court is now convinced that Yergler should be given the opportunity of probation, supervised at a high level, obtain sex offender treatment in the community, and for a lengthy period of time.

IT IS THEREFORE ORDERED that Reid L. Yergler's I.C.R. 35 motion is **GRANTED**; the December 5, 2012, Retained Jurisdiction Disposition and Notice of Right to Appeal is **RESCINDED**; and the decision of the Court to relinquish jurisdiction in that order is **RESCINDED**.

IT IS FURTHER ORDERED the State of Idaho Department of Correction is ordered to transport Reid L. Yergler to the Kootenai County Jail (this is a Shoshone County Case, but the hearing will be held in Kootenai County), and Yergler is ordered to appear before this Court on Wednesday, May 8, 2013, at 2:00 p.m. for imposition of the terms and conditions of probation.

NOTICE OF RIGHT TO APPEAL

YOU, Reid L. Yergler, 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 2nd day of May, 2013.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of May, 2013 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Rick Baughman- Defense attorney
Prosecuting Attorney - Josh Studor

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

IDOC Transport

**CLERK OF THE DISTRICT COURT
SHOSHONE COUNTY**

BY: _____, Deputy