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### State v. Moore Appellant's Brief Dckt. 46429

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 46429-2018
Plaintiff-Respondent,	)	
	)	BONNEVILLE COUNTY NO. CR-2017-11703
v.	)	
	)	
BRYON LEE MOORE,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Bryon Lee Moore pled guilty to possession of sexually exploitative material, distribution of sexually exploitative material, and one count of lewd conduct. The district court sentenced him to an aggregate term of thirty-five years, with ten years fixed. Mr. Moore appeals, and he argues the district court abused its discretion by imposing an excessive sentence.

Statement of Facts and Course of Proceedings

The State charged Mr. Moore with five counts of possession of sexually exploitative material of children, one count of distribution of sexually exploitative material, and one count of

lewd conduct with a child. (R., pp.64–65.) Pursuant to a plea agreement with the State, Mr. Moore pled guilty to one count of possession of sexually exploitative material, distribution of that material, and lewd conduct. (R., pp.90–93; Tr., p.14, L.13–p.15, L.18, p.21, L.24–p.26, L.18.) The State agreed to dismiss the remaining charges. (R., pp.90–91; Tr., p.14, L.20–p.15, L.14; *see also* R., pp.115, 117 (motion and order of dismissal).) The State did not agree to recommend a particular sentence. (Tr., p.15, Ls.1–7.)

At sentencing, Mr. Moore requested an aggregate sentence of fifteen years, with five years fixed. (Tr., p.40, Ls.7–10.) The State recommended an aggregate sentence of thirty years, with twelve years fixed. (Tr., p.42, Ls.2–11.) The district court sentenced Mr. Moore to ten years fixed for possession of sexually exploitative material; thirty years, with ten years fixed, for distribution; and thirty-five years, with ten years fixed, for lewd conduct. (Tr., p.52, Ls.14–23.) The district court ordered the sentences to be served concurrently. (Tr., p.53, Ls.24–25.) Accordingly, Mr. Moore received an aggregate sentence of thirty-five years, with ten years fixed,

Mr. Moore timely appealed from the district court’s judgment of conviction. (R., pp.107–09, 121–23.)

#### ISSUE

Did the district court abuse its discretion when it imposed an aggregate sentence of thirty-five years, with ten years fixed, upon Mr. Moore following his guilty pleas to possession of sexually exploitative material, distribution of sexually exploitative material, and lewd conduct?

## ARGUMENT

### The District Court Abused Its Discretion When It Imposed An Aggregate Sentence Of Thirty-Five Years, With Ten Years Fixed, Upon Mr. Moore Following His Guilty Pleas To Possession And Distribution Of Sexually Exploitative Material And Lewd Conduct

“It is well-established that ‘[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.’” *State v. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (alteration in original)). Here, Mr. Moore’s sentences do not exceed the statutory maximum. *See* I.C. §§ 18-1507(2)(a), (3) (ten-year maximum for possession), -1507(2)(d), (4) (thirty-year maximum for distribution), -1508 (maximum of life for lewd conduct). Accordingly, to show that the sentence imposed was unreasonable, Mr. Moore “must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts.” *State v. Strand*, 137 Idaho 457, 460 (2002).

“‘Reasonableness’ of a sentence implies that a term of confinement should be tailored to the purpose for which the sentence is imposed.” *State v. Adamcik*, 152 Idaho 445, 483 (2012) (quoting *State v. Stevens*, 146 Idaho 139, 148 (2008)).

In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing, focusing on the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

*Stevens*, 146 Idaho at 148. “A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution.” *State v. Delling*, 152 Idaho 122, 132 (2011).

Here, Mr. Moore asserts the district court abused its discretion by imposing an excessive sentence under any reasonable view of the facts. Specifically, he contends the district court

should have sentenced him to a lesser term of imprisonment in light of the mitigating factors, including his absence of criminal record, military service, amenability to treatment, and remorse and acceptance of responsibility.

First, the lack of a serious criminal record supports a lesser sentence for Mr. Moore. “The absence of a criminal record is a mitigating factor that courts consider.” *State v. Miller*, 151 Idaho 828, 836 (2011). “It has long been recognized that “[t]he first offender should be accorded more lenient treatment than the habitual criminal.” *State v. Hoskins*, 131 Idaho 670, 673 (Ct. App. 1998) (alteration in original) (quoting *State v. Nice*, 103 Idaho 89, 91 (1982)). Here, as shown in the PSI, Mr. Moore has no prior arrests or felony convictions. (Presentence Investigation Report (“PSI”),<sup>1</sup> p.7.) He has one past misdemeanor charge for failure to purchase a driver license, but that charge was dismissed. (PSI, p.7.) Mr. Moore submits the absence of any prior convictions or arrests supports a more lenient sentence.

Second, Mr. Moore’s military service supports a lesser sentence. A defendant’s prior military service is a recognized mitigating factor. *Nice*, 103 Idaho at 91. In this case, Mr. Moore enlisted in the Navy in 2000, at the age of eighteen, and he was honorably discharged in 2008. (PSI, p.10.) He spent one deployment in a Middle East war zone. (Aug. R., p.6.) He did not have any disciplinary problems in the military. (Aug. R., p.6.)

Third, Mr. Moore was amenable to treatment. (See Tr., p.39, L.24–p.40, L.2.) The psychosexual evaluation (“PSE”) reported Mr. Moore admitted to the offense, felt guilty about his behavior, and was sorry for the victim. (Aug. R., p.25.) Mr. Moore also reported he wanted help. (Aug. R., pp.3, 25.) Similarly, the PSE opined Mr. Moore’s family would provide support to prevent re-offending behavior. (Aug. R., p.23.) His family was present at sentencing, and his

sister wrote a letter in support. (Tr., p.45, Ls.8–24; Aug. R., p.28.) Mr. Moore’s amenability to treatment stands in favor of mitigation.

Finally, Mr. Moore expressed great remorse for his actions and accepted responsibility for the crimes. Acceptance of responsibility, remorse, and regret are all factors in favor of mitigation. *State v. Shideler*, 103 Idaho 593, 595 (1982). During the presentence interview, Mr. Moore understood that his crimes warranted some term of incarceration. (PSI, p.12.) Similarly, at sentencing, he recognized, “I have made horrendous choices, and now I must atone for those choices by the horrendous consequences.” (Tr., p.47, Ls.17–18.) He acknowledged, “I’m sorry” “only goes so far” and “not far enough” based on his actions. (Tr., p.48, Ls.15–18.) He was “truly deeply, terribly sorry” and would do whatever he could to remedy the harm he caused to the victims. (Tr., p.48, L.24–p.49, L.4.) Moreover, the prosecutor highlighted his remorse at sentencing. The prosecutor stated, “In mitigation, this defendant has been very remorseful, and he has been very, very, very forthcoming with the things that he’s done, with his interests, and all of those things. I think that speaks well of him.” (Tr., p.43, Ls.14–17.) Mr. Moore’s acceptance of responsibility, remorse, and regret stand in favor of mitigation.

In summary, Mr. Moore argues the district court failed to exercise reason in weighing the mitigating factors in his case and thus abused its discretion by imposing an excessive sentence. He contends proper consideration of the mitigating circumstances support a more lenient sentence of fifteen years, with five years fixed.

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<sup>1</sup> Citation to the PSI refer to the thirty-one page electronic document with the confidential exhibits.

CONCLUSION

Mr. Moore respectfully requests this Court reduce his sentence as it deems appropriate. Alternatively, he respectfully requests this Court vacate his judgment of conviction and remand this case to the district court for a new sentencing hearing.

DATED this 27<sup>th</sup> day of March, 2019.

/s/ Jenny C. Swinford  
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JENNY C. SWINFORD  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27<sup>th</sup> day of March, 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

JCS/eas