

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.)
)
) LAWRENCE L. NELLSCH)
) DOB:)
) SSN:)
) IDOC: 21726)
)
) Defendant.)
 _____)

Case No. **CRF 1984 42615**

**ORDER DENYING I.C.R. 35
MOTION AND NOTICE OF
RIGHT TO APPEAL
(Illegal Sentence)**

On April 23, 1985, Lawrence L. Nellsch was sentenced in three different cases, the Honorable James G. Towles presiding, to an indeterminate twenty-five year term for kidnapping, concurrent fifteen year terms for robberies, concurrent five year terms for infamous crime against nature, and three years for possession of a controlled substance (cocaine), to be served consecutive with the robbery sentences. On March 31, 1986, the Court of Appeals of the State of Idaho issued its decision on appeal in this case, *State v. Nellsch*, 110 Idaho 594 (1986), remanding back to district court with instructions that Nellsch had to be sentenced to a life term for the first degree kidnapping charge, pursuant to the kidnapping statute, Idaho Code § 18-4504. On July 7, 1986, Judge Towles filed an Order Correcting Sentence in all three cases. In that order he sentenced Nellsch to: an indeterminate life sentence for first degree kidnapping (CRF 42615) to run consecutively with the sentences for the controlled substance and infamous crime against nature charge; two indeterminate fifteen year sentences for the two counts of robbery to run concurrently

with the indeterminate life sentence for first degree kidnapping (also CRF 42615); and in the other two cases, three years indeterminate on the infamous crime against nature charge to run concurrently with the three years fixed on the controlled substance charge; and three years fixed on the controlled substance charge.

On September 13, 2004, Nellsch *pro se*, filed the instant I.C.R. 35 Motion for Correction or Reduction of Sentence, claiming that Judge Towles changed the sentence on the kidnapping charge to life in prison. Nellsch also requested counsel, and on October 12, 2004, this Court ordered the appointment of counsel, and in that order, limited the issue on the Rule 35 motion to claims of an illegal sentence, noting that this Court lacks jurisdiction to hear an I.C.R. 35 motion on a legal sentence or any claim for leniency, due to the passage of time. 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.

Oral argument was heard on November 18, 2005. Counsel for Nellsch was given additional time, until December 1, 2005, to research any claim of double jeopardy or due process violation. No brief was filed as of December 1, 2005. Accordingly, the matter is now at issue.

The sentence imposed on July 7, 1986, is within the range of lawful sentences for the crime for which sentence was imposed. The sentence imposed on July 7, 1986 is in compliance with the Court of Appeals decision and Remittitur in this case. The sentence imposed on July 7, 1986 is essentially the minimum sentence that could have been given, as it is all indeterminate. Nellsch has failed to even suggest any basis for determining that

the imposed sentence is an illegal sentence.

IT IS THEREFORE ORDERED that Nellsch's *I.C.R. 35* Motion be and the same hereby is **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, , 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 December, 2005.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of December, 2005 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - Anne C. Taylor
Prosecuting Attorney – Lansing Haynes

LAWRENCE L. NELLSCHE
IDOC # 21726
ISCI
P. O. Box 14
Boise, ID 83707

Hon. James J. Towles

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

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy