

STATE OF INDIANA	)	IN THE DUBOIS CIRCUIT COURT
	) SS:	
COUNTY OF DUBOIS	)	CAUSE NO: 19C01-1909-F1-000962
STATE OF INDIANA	)	
	)	
VS	)	
	)	
BRIAN S. BENDER	)	

**MOTION TO CORRECT ERRONEOUS SENTENCE & SUPPORTING
MEMORANDUM OF LAW**

Comes now the State of Indiana by Brian D. Lucchi, Deputy Prosecuting Attorney for the 57th Indiana Judicial Circuit, and advises as follows:

1. A person who commits a Class A felony (for a crime committed before July 1, 2014) shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years. I.C. 35-50-2-4(a).
2. With respect to child molesting (I.C. 35-42-4-3) as a Class A felony, the court may suspend only that part of the sentence that is in excess of the minimum sentence, unless the court has approved placement of the offender in a forensic diversion program under I.C. 11-12-3.7. I.C. 35-50-2-2(b) (repealed effective July 1, 2014).
3. If a person is at least twenty-one (21) years of age and is convicted of child molesting (I.C. 35-42-4-3) as a Class A felony against a victim less than twelve (12) years of age, the court may suspend only that part of the sentence that is in excess of thirty (30) years. I.C. 35-50-2-2(i) (repealed effective July 1, 2014).
4. “[B]oth Indiana Code section 1-1-5.5-21 and section 1-1-5.5-22 state that the new criminal code does not affect: (1) penalties incurred; (2) crimes committed; or (3) proceedings begun before the effective date of the new criminal code sections, i.e., July 1, 2014. These sections also provide that [t]hose penalties, crimes, and proceedings continue and shall be imposed and enforced under prior law as if [the new criminal code] had not been enacted.” *Marley v. State*, 17 N.E.3d 335, 340 (Ind. Ct. App. 2014) (internal quotation marks omitted).
5. Under I.C. 35-38-2.6, a court may order a person to be placed in a community corrections program as an alternative to commitment to the department of correction. However, direct placement in community corrections is not applicable to persons convicted of sex crimes under I.C. 35-42-4. I.C. 35-38-2.6-1(b)(1).
6. Under I.C. 35-38-2.5-5, a court may order an offender confined to the offender’s home for a period of home detention as a condition of probation. However, this condition of home detention would only be applicable when a portion of the offender’s sentence can be suspended to probation.

7. In the above-captioned cause, pursuant to a plea agreement, the defendant pled guilty to Count 1, Child Molesting, a Class A felony under I.C. 35-42-4-3. Pursuant to the plea agreement, the defendant's sentence was left open to the Court, with a cap of thirty (30) years.
8. The Court found, as an aggravating factor, that the victim of the offense in the above-captioned cause was less than twelve (12) years of age at the time the offense was committed.
9. The defendant was at least twenty-one (21) years of age at the time that he committed the offense to which he pled guilty.
10. The Court has not approved placement of the defendant in a forensic diversion program under I.C. 11-12-3.7.
11. Under the aforementioned statutory authority, having accepted the plea agreement, the Court was required to sentence the defendant to between twenty (20) and thirty (30) years in the Indiana Department of Correction, executed entirely at the Department of Correction.
12. The Court sentenced the defendant to twenty-five (25) years in the Indiana Department of Correction. However, the Court provided that the defendant's sentence may be executed in Community Corrections, as long as the defendant remains eligible.

WHEREFORE, the State respectfully requests that the Court revise its sentence in the above-captioned cause and sentence the defendant within the parameters of the above statutory authority.

Respectfully submitted,
/s/Brian D. Lucchi

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the defendant by his attorney, Gerald R. Thom, by e-filing on or about the date of filing the same.

/s/ Brian D. Lucchi
Brian D. Lucchi