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A How-To Guide to Sentence Review

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A how-to guide to sentence review

Public defenders enter uncharted waters when Court rules indigent clients will have counsel during SRD hearings

By UM Assistant Law Professor Jeffrey T. Renz, Criminal Defense Clinic

Doing your first sentence review? Don't know what you're doing? I accept responsibility for the first half of your predicament. Most sentence review work was once done by third-year law students. Unfortunately in 1997 the Montana Department of Corrections decided to de-fund the Montana Defender Project. This year, in a case brought by the Defender Project, the Montana Supreme Court concluded indigent defendants are entitled to counsel at sentence review.[1]

As a result of that decision, the burden of representing indigent defendants before the Sentence Review Division now falls on public defenders. Few of you have done this before. I thought it might be useful to relate what we learned over past years. Some of this is elementary. Forgive me if you have heard it before.

The Sentence Review Division

The Sentence Review Division (SRD) was created by statute in 1966. Since it is a division of the Montana Supreme Court, review by the Division is review by the Supreme Court from which there is no appeal. Nevertheless, the buck does not always stop there. The Supreme Court will look at an SRD decision if the defendant can show the Division lacked jurisdiction.[2] I believe the Court would also exercise its supervisory authority in some cases where jurisdiction is not an issue.

The sentence review statute, MCA §§ 46-18-901 to -905 (1997), was taken almost verbatim from Connecticut's statute.[3] As provided by the statute, the SRD consists of three district judges appointed by the Chief Justice. Judges serve three-year, staggered terms. The statute permits the Chief Justice to appoint a chair. This is always the judge serving his or her third year on the SRD.

As you might expect, conflicts arise when a defendant seeks review of a sentence imposed by one of the Division's sitting judges. For such cases or when a panel member is absent, the Chief Justice appoints a "permanent" substitute.[4] Generally Judge Robert Boyd of Anaconda sits (when he isn't touring Ireland or Notre Dame or some such place.) When Judge Boyd is unavailable, other judges are called in. Because of his proximity, Judge Ted Mizner often replaces Judge Boyd.

Scope and Standard of Review

The SRD has the power to increase, to decrease, to affirm a sentence. This also means the Division may alter any sentence condition.[5]

Technically speaking, the SRD does not review sentences for legality. That said, the Division frequently modifies sentences to provide an equitable remedy for a legal error.[6]

If the District Court has imposed an illegal sentence you must make a tactical decision. You may appeal the error to the Montana Supreme Court, which would vacate the sentence and remand the case for resentencing or simply strike the illegal portion of the sentence allowing the

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CLE brochure misprint has tax seminar on right date, wrong day

The CLE Institute is sponsoring a tax seminar Thursday, October 15 at Missoula's Holiday Inn Parkside. The UM School of Law Tax Institute is on Friday and Saturday, October 16 and 17.

Brochures sent to State Bar members indicated October 15 is a Friday.

The CLE seminar is approved for 6.25 credits. To register, call the State Bar at (406) 442-7660. ❐

This one's a Sheehy!

Skeffington Runyan "Skeff" Thomas was born July 29 to State Bar President Martha Sheehy and her husband, Ninth Circuit Court Judge Sid Thomas of Billings.

If the name "Skeff" sounds familiar, it's because the baby was named after his grandfather, retired State Supreme Court Justice John "Skeff" Sheehy of Helena.

Skeff has a brother, Oscar John Thomas, 2, who looks like his father. "But this one," Martha says, "is definitely a Sheehy."

Young Skeff weighed 8 pounds, 5 ounces and was 21 inches long at birth.

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legal portion to stand. If the defendant takes the SRD route, the Division can simply rewrite the sentence to cure the illegality. Exercising its power to modify the sentence, it can correct an illegal sentence by omitting the illegal portion. In some of those cases it has also given effect to the sentencing judge's intent by increasing the prison time. When we felt the SRD would giveth and taketh away, we took the case to the Supreme Court.

The core function of the SRD is to review sentences for their "equity." This is best reflected in the claim that the defendant's sentence is "excessive." (This sounds like a good place to tell you what arguments tend to be persuasive and what arguments are not. You'll have to wait a few paragraphs while I whine about changes in the statute.)

When the statute was enacted, the watchword was sentence uniformity. The Division was to achieve uniformity by reducing sentences that were excessive and increasing those that were too lenient. During the first twenty years under the statute, the SRD did just that. The majority of sentences were affirmed. Many sentences — up to 20 percent in some years — were reduced. Over this period the Division ordered reductions at twice the rate it ordered increases. The prison was not overcrowded and our taxes paid for teachers instead of prison guards.

All things change. In 1985, prosecutors (and, I suspect, some district judges), unhappy with or alarmed at the rate of sentence reduction and perhaps disappointed the corrections budget wasn't driving the State of Montana to bankruptcy, persuaded the Legislature to amend the statute. The amendment provided that the district court's sentence was "presumed correct."[7] These two words worked a fundamental change in sentence review. Sentencing uniformity was cast adrift. If the defendant could not overcome the presumption of correctness, the SRD would not change the sentence, whether or not it was consistent with sentences given for the same offense across the Montana.

The presumption is difficult to overcome. It altered our approach to sentence review. (Pay attention. Here comes the part you were waiting for.) As things now stand, these are the more persuasive arguments in favor of sentence reduction, in no particular order:

■ The terms of confinement should run concurrently. Where the sentences are for crimes that arise from the same event or transaction, sentencing philosophy calls for them to run them concurrently. Be careful how you craft this because the Legislature altered MCA § 46-18-401, adding subsection (4), which requires the court to consciously direct that sentences run concurrently. This reflects an erosion of the philosophy of concurrent sentences from the Legislature's point of view, so do not present this as a legal argument.

■ The sentence exceeds the codefendants sentence. Keep in mind the defendants' circumstances and role should be at least similar.

■ The defendant made full restitution.

■ The sentence is facially illegal because it (1) is an *ex post facto* application of the statute; (2) was calculated incorrectly; (3) exceeds the minimum permitted by law; (4) fails to comply with statute (Title 46, Chapter 18, MCA); or (5) violates the law in some other manner that may be corrected by amending the sentence.

Typically unsuccessful arguments:

■ The sentencing court failed to consider the defendant's remorse.

■ The belief of the sentencing judge as to how much time the defendant

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would serve is inconsistent with the time they are actually serving.

■ Sentence uniformity. Nevertheless, this argument can be persuasive for a nonviolent, first offense. It is most persuasive when certain judges have reputations for giving severe sentences for certain offenses. We also had success comparing the sentence with federal sentencing guidelines.

The statute guarantees your client's right to appear. If (he or she) will make a good impression on the panel, by all means insist on his or her right to appear in person.

When you make a sentence uniformity argument, one member of the panel will always ask whether the characteristics of the other crimes or of the other offenders were similar to your client's. Of course, this is an unfair question, since those statistics are not kept and because those other presentence investigations are confidential.

To show the sentence is a gross departure from others given, you will need sentencing statistics, which the Department of Corrections keeps by crime and year. They are your source if you are making a uniformity argument. The now defunct Sentencing Commission gathered some statistics about characteristics of the crime and the defendant. As long as we are talking about uniformity, remember that with the abolition of good time, post-1997 offenses should result in prison terms 50 percent less than sentences imposed for pre-1997 offenses.

■ Any argument that attempts to overturn a plea bargain that fixed the sentence.

Circumstances that typically result in an increase of the sentence:

■ The victim was a child or was elderly;

■ The crime was especially violent;

■ The defendant's criminal history was not reflected in the sentence.

Defender Project interns also had some success arguing for a remand to the district court. The Division's remand authority, found in its rules, is broad:

> [I]f there are critical matters which should have been presented at the sentencing hearing, the Sentence Review Division may vacate the sentence and remand it for resentencing based on proper documentation. Rule 15, S.R.D. Rules.

The Montana Defender Project, under David Stenerson's watch, prepared an *Index of Sentence Review Authority*, a collection of decisions of the Division through 1993 that modified sentences and cross-referenced them by crime and reason for the change. Unfortunately, only two copies exist. There were three, but the Yellowstone Public Defenders Office has never returned the third one and I am sure the County Attorney will file felony charges after he reads this. If you would like a copy, contact us and we will quote a price. (NOTE: Because you read about it in *the Montana Lawyer*, the State Bar may charge a finder's fee to offset the defeated dues increase.)

If you are too cheap to pay for the *Index*, the Division's decisions are published in the *Montana Reports*. The uninitiated will find them in the back of the last volume of each year. (It's the volume that says "Sentence Reviews" on the binder in gold ink.) Keep in mind the page numbering starts over for sentence review citations. *State v. Woods*, 235 Mont. 1 (S.R.D. 1988), won't be found in the front of the book.

The Procedure

Your client should file an application for review within sixty days of imposition of sentence. The application must be filed with the clerk of the district court. The clerk of court is required to give defendants notice of their right to sentence review together with the application form. Nevertheless, I think it is counsel's duty to advise their clients of their right to sentence review, of the

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upside and downside, and (unless your client directs otherwise) to perfect their right by filing a timely application.

You may find this last act difficult. You will notice the application form appended to the SRD's Rules has no space for counsel's signature. (NOTE: The Division's Rules are published in the *Lawyers' Deskbook and Directory*, available from the State Bar at a reasonable price. Be sure to mention my name when you order it so I can collect a commission from George Bousliman, payable from future dues increases.) Clerks of court have become accustomed to receiving *pro se* applications from prisoners. We once filed an SRD application for our client, over our signature. The local clerk of court returned it.

The Division is lenient about waiving the filing deadline, which is not jurisdictional. So long as defendants can provide the SRD with a plausible reason for filing a late application, it will hear their case.

When the Division receives an application, it immediately orders a copy of the District Court record. This is an abridged version, typically containing only the Information, the Judgment, the PSI, any plea bargain, and other documents relied upon by the sentencing judge. Division rules direct the clerk to forward a copy of the transcript of sentencing, but this is rarely done. The clerk's minutes are often included with the file. If you did not represent the defendant in the lower court, you should ask for a copy of the SRD file. You must ensure the Division has all the materials you think relevant because the clerk may not forward the most important document.

That brings us to the question of "new information." The SRD and I disagree on what "new" information it may hear. The Rules say the "Division will not consider any matter or development subsequent to the imposition of the sentence in the District Court."[8] The Commission Comment is of the same vein:

It is intended that the statute be construed so as to prevent the consideration of the evidence which was not before the trial judge, such as post-sentence rehabilitation, and cooperation, but allows the division to require the production of . . . any other documents such as psychiatric reports were before the primary sentencing authority, and any other relevant material that could have or should have been obtained at the time of sentencing. Commission Comment to MCA § 46-18-904.

The SRD, however, construes 46-18-904 to mean it will neither hear any witness who did not testify nor receive any document not offered at the sentencing hearing. I read the statute to mean post-sentencing information may not be considered, but information existing at the time of sentencing may be presented to the Division. I doubt defendants will sandbag the district court, since defendants will want to make their best case before both the sentencing judge and the Division. I fought to get new information in, and the judges were kind about not holding me in contempt.

In any event, you should prepare a formal memorandum of

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your arguments and file it with the SRD before it hears your case. Remember, Sentence Review is a hearing in two parts. The first part must focus on that damned presumption and persuade the Division the sentence is clearly excessive. The second focuses on the correct sentence.

Send an original and three copies of your memorandum to the Division. This isn't required by rule. But if you don't want the judges to read your memorandum, send only the original.

The hearing is a mini-sentencing hearing. It is highly informal. The rules of evidence do not apply. The chief judge will begin the hearing by advising the defendant of the SRD's power to increase or decrease the sentence or to leave it unchanged. The judge will ask the defendant if, in light of that, he or she wishes to proceed. Then the court will hear your argument.

The key? Keep it short. An oral argument that exceeds five minutes (not counting the judges' questions) will normally be too long. That said, be creative. You may bring witnesses. You may swear them in and interrogate them or have them give unsworn statements. Their statements may be audible or written. Do not hesitate to use visual aids relevant to your argument. Abstract key parts of documents and give them to the judges so they may follow along.

The statute guarantees your client's right to appear.[9] Since the Department of Corrections has been playing Johnny Inmateseed with prisoners, your client may be out of state at the time of the hearing. If your client will make a good impression on the panel, by all means insist on his or her right to appear in person.

Should your client say something? The answer falls between two poles. At one end is our client who said candidly, "I'll never do that again," only to look up and see three judges beaming at her. (Her sentence was reduced to time served.) The other was the client who, told by counsel to remain quiet, told the panel what jerks the police and sentencing judge were. He had already received the maximum sentence. The SRD rewarded his speech with a no-parole limitation.

This is your call. Be aware the Division always asks defendants if they have anything that they want to say. We advised our obdurate defendants simply to say, "Thank you for your time."

The SRD panelists are efficient. They deliberate and decide immediately. They issue a written decision within thirty days of the hearing. Following the decision, you have the right to move to reconsider. These motions are, understandably, rarely granted.

When the Division alters a sentence, the case is remanded to "the court sitting in any convenient county." This is shorthand for Judge Ted Mizner of Powell County and the judges of Yellowstone County, who will prepare and issue an amended judgment.

Defender Project interns, applying these principles, had the highest success rate among attorneys appearing before the Division. Apply the principles. Certainly feel free to call to discuss a case. (NOTE: Ethical rules preclude the State Bar from charging a finder's fee, even to offset the defeated dues increase, for such a consultation.)[10]

Endnotes

1 *Ranta v. Mahoney*, 1998 MT 95, 1998 WL 220077 (1998).

2 See, *State v. Torres*, 277 Mont. 514, 922 P.2d 1180 (1996) (finding that the Division lacked jurisdiction to increase a sentence where it had not found that the sentence was clearly inadequate).

3 See, Commission Comments to Mont. Code Ann. §§ 46-18-901 to -904 (1995); Gen. Stat. Conn. §§ 51-194 to 51-197 (1966).

4 Mont. Code Ann. § 46-18-902 (1997).

5 The power to increase is real. The Division has designated defendants persistent felony offenders and increased sentences accordingly. *State v. Rose*, 210 Mont. 16 (S.R.D. 1984). One dissenting judge proposed the Division hold a death penalty hearing. *State v. Heit*, 263 Mont. 46 (S.R.D. 1993).

6 See, *State v. Hammer*, 251 Mont. 44 (S.R.D. 1991) (dropping sentence for persistent felon because it was incorrectly calculated); *State v. Gardipee*, 246 Mont. 36 (S.R.D. 1990) (dropping dangerous designation because it was an ex post facto application of statute).

7 Ch. 654, § 1, Laws of 1985; Mont. Code Ann. § 46-18-904(3) (1997).

8 S.R.D. Rule 18.

9 Mont. Code Ann. § 46-18-904(2) (1997).

10 Rule 5.4, Rules of Professional Conduct.

REMINDER: ADR directory listings due October 9

Lawyers who provide alternative dispute resolution services have until October 9 to be included in the *1999 Directory of Facilitators and Mediators*, sponsored by the State Bar of Montana and the Montana Consensus Council.

Send typed biographical information and $35 to the Montana Consensus Council, Room 219, State Capitol, Helena, MT 59620-0801, or request an e-mail form at wharmon@ixi.net. For more information, call (406) 444-2075. ❐