

Q & A – SENTENCE REVIEW IN MONTANA

Prepared by the Office of the State Public Defender

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Q: What steps must a defendant take in order to seek formal review of his sentence?

- When a defendant is sentenced and the written judgment filed, the Clerk of Court should send a copy of the written judgment along with the Application for Sentence Review to the defendant.

Q: What is the deadline for filing an application for sentence review?

- Rule 1 (Rules of the Sentence Review Division [SRD]) provides that a defendant seeking review of the sentence must file an application within sixty (60) days from the date of sentencing.

Q: What effect does an appeal or a petition for post conviction relief have on the filing of an application for sentence review?

- The SRD policy is for the defendant to exhaust all legal remedies pertaining to the sentence before seeking equitable relief.
 - Appeal and post conviction are the appropriate methods of dealing with such legal issues.
- Thus, Sentence Review should be the last proceeding pursued by a defendant who has issues relating to the excessive nature of the sentence.
- If the defendant files an appeal or a post conviction petition, the SRD will automatically stay the application until the appeal and/or post conviction is complete.

Q: What issues will the SRD consider at a sentence review hearing?

- SRD will not hear claims of innocence, ineffective counsel, or illegal sentencing.
- In reviewing a sentence, the SRD presumes that the sentence imposed is correct.
- The SRD will not reduce a sentence unless the sentence is clearly excessive.
- The SRD will not increase a sentence unless the sentence is clearly inadequate.
- At a sentence review hearing, the SRD will only consider facts that were presented to the sentencing court. The SRD will not consider any facts which have occurred since sentencing.
- In most cases the SR file will consist of the complete district court file in the case. At a minimum counsel's file for an SR matter should contain:
 - The Information and Affidavit in Support of Probable Cause
 - The plea agreement, if any
 - The PSI;
 - The written sentencing order (judgment);
 - Minute orders prepared by the clerk on the day of the particular proceedings;
 - Letters or other evidence submitted to the court at sentencing
- In cases involving resentencing as a consequence of probation violation counsel's file for an SR matter should, at a minimum, contain:
 - The report of violation filed by AP&P
 - The Petition to Revoke filed by the county attorney;
 - The sentencing order (judgment)

Q: What is an “excessive” sentence? What is an “inadequate” sentence?

- The Montana Supreme Court has not clearly defined what makes a sentence “excessive.” Therefore, a defendant should consider and present any and all factors which a court might rationally regard as unfair or inequitable.
- Increases at the SR level are very rare. That said, counsel should be careful to inform clients that the SRD does have the unbridled power to increase as well as reduce sentences. If you are concerned about the possibility of increase, you should alert the OPD SR office.
- Counsel should remember, however, that the ultimate decision whether to pursue sentence review or not belongs to the client and not to the lawyer.

Q: What kinds of cases are especially appropriate for sentence review?

- Sentences where the trial court deviates from the prosecutor’s recommendation without stating reasons in support of the deviation.
- Sentences where the sentence at issue appears to be out of line with the sentencing history of particular crimes within particular jurisdictions around Montana.
- Sentences where the sentencing court increases the sentence beyond that mutually recommended by the prosecution and defense and/or where defense counsel or the prosecutor noted objection on the record.

Q: Are there any kinds of cases which are not especially appropriate for sentence review?

- Resentencings stemming from probation revocations:
 - These are new sentences and must be challenged as such.
 - Remember to look carefully at the court’s findings in support of violation as well as the facts of the underlying offense which led to the original sentence.
 - Be sure, also, to determine whether the court revoked all of the original probation time when it resentenced. Although it is rare, the SRD has the power to increase all sentences, including resentences resulting from revocation of probation. If you determine that the resentencing court did not revoke all of the probation time be sure to caution the client about the possibility that the SRD might do so.
 - Sometimes an SRD panel member will assert that the probation resentencing relates to the original crime. To minimize this problem attorneys at the district court resentencing should try to include a discussion on the record clarifying that resentence is being imposed due to the defendant’s failure to follow the rules of probation rather than for the behavior that led to the original offense (for which he/she has already been sentenced.)
 - The best practice is to get that in the written reasons for the sentence. If even if that notation only appears in a minute entry, however, counsel at the SR hearing can point it out to the panel.
- Persistent felony offenders who received sentences on the low end of the mandatory sentencing range are always at risk of increase.
- Cases resolved by plea agreement where the defendant concurred with the prosecution’s recommendation and the court followed the recommendation:
 - It’s difficult to advocate such a sentence is inadequate or excessive. The SRD will customarily carefully review the PSI for any indications by AP&P that might undercut the agreement reached by the parties. Carefully discuss with the client how he or she is presented by the PO who prepared the report. Be especially alert for comments made by the PO at or before sentencing. These can prove to be very harmful to a defendant seeking a reduction of sentence.

Q: How often does the sentence review division hold hearings and how long does it take for the division to render a decision?

- The SRD holds hearings for male defendants four times each year, in February, May, August, and November. The hearings – which take place in the parole board hearing room at the Montana State Prison in Deer Lodge – are almost always set for the first Thursday and/or Friday of the month.
- The SRD holds hearings for female defendants two times each year, in April and October. The hearings – which take place in the visiting room at the Montana Women’s Prison in Billings – are almost always set for first Thursday and/or Friday of the month.
- The SRD will generally issue written decisions on all cases within three to four weeks following the hearing.

Q: Other tips for effective sentence review practice –

- Listen carefully during the oral pronouncement of sentence. The judge may either include or fail to include statements which will bolster an argument that the sentence is excessive.
- When you receive the written sentencing order review it carefully to determine whether it contains specific findings in support of the sentence imposed.
- Some courts fail to do that. If there are no findings stated in the written judgment, consider whether you should pursue the 120 day remedy you have under §46-18-116 MCA, to object to the written judgment and ask that it be amended to insert reasons.
- As for the process itself, your clients need to know that, if they are not pursuing an appeal, or post conviction, they will get on the agenda to be heard as soon as the Judicial Assistant to Sentence Review has the necessary record from the district court
- OPD has a special procedure for handling sentence review cases. Trial court counsel should advise clients that he/she will be represented at SR by an attorney who is familiar with the SR process and how it operates.
- When the client advises he/she wishes to proceed to sentence review, you should contact the OPD SR office and discuss whether OPD should obtain a transcript of the sentencing hearing.

Q: Can a defendant appeal a decision issued by the sentence review division?

- There is no appeal from Sentence Review decisions.
- If there is a legal issue with the sentence, counsel should contact the Appellate office and discuss whether the issue is viable. If so file the SR application and request a continuance pending the appeal.

Q: What is the composition of the SRD panel for a particular case?

- The SRD panel consists of three district (trial) court judges selected on a rotating basis from around the state.
- Each judge serves a three-year term. The member serves as presiding judge during the final year of his / her term.
- Because the character of the SRD changes with each new appointment, it is important that trial counsel communicate with the OPD SR office regarding the particular judicial personality or philosophy which is prevalent during the particular session. Changes in the composition of the panel will often result in a different viewpoint from the panel regarding the specific issues presented in a sentence review case.