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SURVEY

MONTANA'S SENTENCE REVIEW DIVISION: A TWENTY YEAR OVERVIEW

Charles S. Jordan

I. INTRODUCTION

Over two decades ago, in response to increasing dissatisfaction with judicial discretion in criminal sentencing, the Montana legislature enacted sentence appeal statutes.¹ Prior to the adoption of these statutes there existed little, if any, recourse for a defendant who wished to contest the equity of his or her criminal sentence. Although willing to determine the legality of the sentence imposed, the Montana Supreme Court, like the federal courts² and the large majority of state courts,³ was reluctant to exercise jurisdiction over the propriety of a statutorily authorized sentence.⁴

During the postwar years, however, increasing nationwide concern about discrimination and individual rights, combined with a


². See, e.g., Gurera v. United States, 40 F.2d 338 (8th Cir. 1930) stating: “If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.” Id. at 340-41.


soaring crime rate and a wave of prison uprisings, focused public attention on the previously ignored grievances of the convicted criminal. Critics pointed to the irony of a legal system which took such pains to regulate the guilt determination process while at the same time vesting the trial judge with broad and unreviewable discretionary power to determine the convicted criminal’s fate.

Not surprisingly, adherence to this policy of nonreviewable judicial discretion resulted in unchallenged disparate sentences. Despite the best of intentions, trial court judges, often inexperienced in criminal cases, confronted with competing social considerations and authorized to employ a wide variety of penal sanctions, frequently imposed widely disparate sentences for similar crimes. In response, a number of jurisdictions enacted legislation creating forums for sentence review varying in form from sentencing tribunals to review by appellate courts. Despite the initial encouragement provided by these developments, the sentence appeal process adopted by most jurisdictions appears largely ineffectual. Infrequent hearings, limited organizational resources, and inordinately high definitional standards as to what constitutes sentence disparity resulted in limited sentence modifications.


8. See generally cases and statutes cited, supra note 3.

9. The Criminal Justice Standards Project of the American Bar Association reporting on studies of state appellate review systems found: "[W]ithout serious exception . . . that appellate review had little more than a negligible impact, generally providing a remedy only in egregious cases but not capable of developing clearly articulated criteria or standards by which to guide future sentencing decisions." Report of the Criminal Justice Standards Project of the American Bar Association, 193 (1980).

10. E.g., Samuelson, supra note 5, at 73.

11. Id.

12. Id.

13. E.g., as of 1977, only 2.5 percent of all sentences eligible for review in Massachu-
In contrast to the limited effect of appellate review in many other jurisdictions, the vigorous approach to sentence review adopted in Montana has had a significant impact on criminal sentencing. Not surprisingly, however, this more active approach has also aroused considerable criticism and opposition.

II. THE SENTENCE REVIEW DIVISION

Modeled after the review system adopted in Connecticut, Montana's sentence review division functions as a subdivision of the Montana Supreme Court. The primary objective of this review division, as stated in the rules of the sentence review division, remains "to provide for uniformity in sentencing and to ensure that the interests of the public and the defendant are adequately addressed by the sentence." In achieving this goal, the review division is specifically directed to consider "(i) [t]he crime committed; (ii) [t]he prospects of rehabilitation of the offenders; (iii) [t]he circumstances under which the crime was committed; (iv) [t]he criminal history of the offender," as well as the danger posed to society.

The sentence review division consists of three district court judges, appointed by the chief justice of the Montana Supreme Court. Members serve three-year terms on a rotating basis, each member acting as chief of the review division during the third year. To ensure the impartiality of all decisions, section 46-18-902 of the Montana Code Annotated provides that "no judge shall sit

sets received modifications; the frequency of modification in Connecticut was even lower at 1.2 percent. Zeisel and Diamond, supra note 7, at 887.

14. E.g., the modification rate of all eligible sentences in Montana between 1978 and 1982 was approximately 9 percent. Hearing on S.B. 150, supra note 7, at Exhibit I.
15. See infra text accompanying notes 50-56.
18. MONT. CODE ANN. § 46-18-901(4) provides in part: "The review division may adopt any rules which will expedite its review of sentences."
19. Rules of the Sentence Review Division of the Supreme Court of Montana 16 (effective Jan. 1, 1987) [hereinafter Rules of Sent. Rev. Div. ______]. (The former version of these rules appears in MONT. CODE ANN. § 46-18-901 annot.'s. (1987). The current rules have not yet appeared in the Annotations and are available to attorneys through the Secretary of the Sentence Review Division, c/o Court Administrator's Office, 215 N. Sanders, Rm. 315, Helena, Montana 59620.)
20. Id.
21. Id.
23. For a discussion of the advantages of a rotating bench, disseminating sentencing experience to a large body of trial judges, versus the advantages of a permanent tribunal possessing technical expertise, see Coburn, supra note 7, at 225.
or act on a review of sentence imposed by him." 24 In practice, the review division interprets this statute broadly, members generally disqualifying themselves even when their only previous contact with the petitioner involved an unrelated legal matter. Ordinarily, when a member withdraws, an alternate judge replaces him unless the petitioner agrees to a review by the two remaining members.

The review division has the authority, upon the concurrence of any two members, 25 to affirm, decrease, increase or otherwise alter any sentence, subject to those limitations applicable to the original sentencing judge. In reaching its decision, the review division has considerable discretion over what it may or may not consider, the rules of evidence acting only as a "guide" to the proceeding. 26 Nonetheless, the review division does work within certain parameters. Specifically, the review division is enjoined from considering "any matter or development subsequent to the imposition of the sentence in the district court." 27 Moreover, a recent amendment to the sentence review statutes provides that a presumption exists in favor of the sentence imposed by the trial court. 28 The review division has determined that only a sentence which is "clearly inadequate or excessive" 29 will overcome this presumption. Any decision reached by the review division is considered final. 30

III. THE SENTENCE REVIEW PROCESS

Section 46-18-903 of the Montana Code Annotated provides that every defendant sentenced to state prison to serve a term of one year or more may apply for sentence review. Unlike some jurisdictions, 31 this right lies exclusively with the petitioner. The state enjoys no right to appeal the initial sentence.

After a sentence is imposed at the trial court level, the court's clerk notifies all eligible offenders of their right to apply for sen-

31. E.g., Alaska's sentence appeal statute, ALASKA STAT. § 12.55.120(d) (Supp. 1987) provides in relevant part:
   (b) A sentence of imprisonment lawfully imposed by the district court may be appealed to the superior court by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state, the court may not increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.
sentence review.32 The defendant has sixty days from imposition of sentence in which to initiate an appeal by filing an application with the clerk of the sentencing court.33 An extension of time may be, and frequently is, granted.34 The filing of this application does not, however, stay the execution of the sentence.35 Once an appeal is filed, the clerk notifies the district court judge who imposed the sentence, who may then transmit to the review division his reasons for imposing the sentence.36 The review division also has the authority to request the sentencing judge to provide such a statement within seven days.37

Sentence review hearings are held at the Montana State Prison in Deer Lodge.38 The panel convenes at least four times per year or “more as its business requires, as determined by the chairman.”39 The hearings themselves are informal “to allow full expression by all parties and their attorneys.”40 Although the review division places no time restrictions on counsel’s arguments, the average hearing is short, lasting between five and forty-five minutes.

The petitioner is entitled to appear and be represented by counsel at the hearing.41 In contrast to other jurisdictions,42 however, Montana has yet to determine whether this proceeding is a critical stage of the criminal process, thereby entitling the petitioner to an appointed attorney. To ensure adequate representation, the Montana Defender Project serves all inmates who request its assistance.43 This law student-staffed, attorney-supervised clinical program operates out of the University of Montana’s School of Law. The county attorney from the county in which the

34. In the event of untimely application, the secretary of the review division notifies the petitioner that he must file a statement justifying the tardiness of the application within thirty days. The review division may refuse to hear the petitioner’s case if the reasons for late filing are deemed insufficient. Rules of Sent. Rev. Div. 7 (1987). E.g., in a ruling in March of 1986, the review division denied 11 of 18 late applications.
42. E.g., Consiglio v. Warden, 153 Conn. 673, 220 A.2d 269 (1966) (where the Connecticut Supreme Court determined that the petitioner’s constitutional right to counsel extended to sentence review).
43. E.g., in 1986, the Montana Defender Project represented 61 of the 83 petitioners whose sentences the review division reevaluated. Private counsel represented 21 petitioners and one petitioner represented himself.
petitioner was sentenced represents the state. In rare instances, the sentencing judge will attend and participate in the proceedings.

As a general rule, each hearing proceeds in a similar fashion. The review division chairman addresses the petitioner, clarifying the review division's power to increase as well as decrease a sentence and offering the petitioner a final opportunity to withdraw his application prior to the hearing's commencement. The petitioner's counsel presents his case and the state representative, if present, responds. Immediately prior to the conclusion of the hearing, the judges afford the petitioner an opportunity to make a personal statement. At the close of each case, the courtroom is cleared while the members deliberate prior to reviewing the next case. Although the majority of cases are decided during this brief executive council, the review division does not render decisions for approximately thirty days, at which time the petitioner, his counsel, the sentencing judge, the clerk of the sentencing court, and the prison are notified in writing. These decisions, and the reasons behind them, are reported in the Montana Reports as required by section 46-18-905 of the Montana Code Annotated.

IV. OPPOSITION

Although the review division has heard over 1,500 cases since its first hearing in March of 1968, the subject of sentence review versus judicial discretion remains controversial. In both 1983 and 1985, identical bills were proposed in the Montana State Legislature to abolish the sentence review division by repealing sections

46. E.g., in 1986, county prosecutors appeared at sentence review hearings to oppose petitioners in five cases, or in approximately 6 percent of all cases heard.
49. MONT. CODE ANN. § 46-18-905(1) (1987). No sentence review opinions were published in the Montana Reports between August, 1979 and March, 1982. Reported decisions are typically brief, rarely exceeding one-half page in length. Notwithstanding some minor variations these opinions follow a standard pattern, opening with a statement identifying the petitioner, the county where sentencing occurred, the date of the original sentencing, the sentence imposed by the trial court, and in some instances the type of crime committed. Following is the decision either to affirm, amend or remand the sentence, and a brief statement, frequently one or two sentences in length, as to the reasons behind the decision. Dissenting opinions are also provided.
46-18-901 through 46-18-905 of the Montana Code Annotated. Although proponents of these bills recognized the existence of the problem of sentence disparity and that a greater measure of evenhandedness in sentencing would be a "laudable goal," they maintained that the sentence review division failed in its stated purpose.

A summary of the main arguments put forward by proponents of these bills included: 1) the high percentage of sentences reduced, particularly in comparison to the low ratio of sentences increased by the review board; 2) the fact that the sentencing judge having participated throughout the proceeding is better informed, and therefore better able to determine the appropriate sentence; 3) the lack of opportunity for the state to present its side of the issue; 4) the state's inability to initiate the review proceedings, and 5) the tendency for light sentences "to become the norm by which other sentences are challenged," since lenient sentences are rarely challenged.

Key arguments proposed in opposition to these two bills, many advanced by district court judges with practical experience sitting on the sentence review division, included: 1) the lack of experience and training of many trial judges in sentencing criminal defendants; 2) the propensity for sentence disparity in a state with thirty-two district judges dispensing justice; 3) the negative impact of sentence disparity on the defendant and the resulting increased potential of recidivism on those who feel unfairly treated by our legal system, particularly when denied any avenue of appeal; 4) the efficiency of the present system as opposed to the added time and expense of appealing these cases to the state supreme court; 5) the marked improvement of district court judges

51. Hearing on S.B. 150, supra note 7, at 3 (statement of Judge Michael Keedy).
52. See Hearing on H.B. 439, supra note 47, at Exhibit F (comments by Marc Racicot).
53. Hearing on H.B. 439, supra note 47, at Exhibit F (statement of Marc Racicot). See also Hearing on S.B. 150, supra note 7, at 4 (statement of Judge Michael Keedy).
55. Hearing on S.B. 150, supra note 7, at 3 (statement of Judge Michael Keedy).
60. See Hearing on S.B. 150, supra note 7, at Exhibit I (statement of Judge Joseph Gary estimating the average cost of a sentence appealed to the supreme court between
in carefully detailing their reasons for imposing a particular sentence in light of the possibility of sentence review;\(^6^1\) and 6) the lack of any viable alternative to the present review system.\(^6^2\)

Neither of these two bills progressed beyond the judiciary committees of the Montana House or Senate. Nonetheless, many of the points raised by those in favor of abolishing sentence review were well taken by their opponents. Some who argued against these bills did so for lack of any present alternative to sentence review.\(^6^3\) Sentencing guidelines may well be regarded, by some, as a more effective means of achieving sentence reform.\(^6^4\) The recently adopted federal sentencing guidelines established by the United States Sentencing Commission\(^6^5\) may very likely renew the debate as to the effectiveness of our present system.

V. Case Analysis

Despite the controversy generated by Montana's review process, little has been published analyzing the performance of the sentence review division. This section examines which sentences have been modified and, to the extent possible, catalogs the main reasons behind the review division's determinations.

The review division reviewed 1,506 cases\(^6^6\) in eighty-four hearing sessions from March of 1968 to March of 1988. An overview of these cases indicates that the review division upheld the discretion of the district court judges in approximately 70 percent of the cases reviewed.\(^6^7\) Four hundred forty cases, or approximately 29 percent of the total cases heard,\(^6^8\) were reduced, while eighteen

\(^{61}\) Hearing on H.B. 439, supra note 50, at Exhibit I (letter from Judge Leonard Langen to Hon. Ted Schye).

\(^{62}\) Hearing on S.B. 150, supra note 7, at 4-5 (statements by Patrick Melby, representing the State Bar of Montana, and Senator Pinsoneault).

\(^{63}\) Id.

\(^{64}\) Id.

\(^{65}\) Pursuant to 28 U.S.C. § 994(a) (effective Oct. 12, 1984), the United States Sentencing Commission issued guidelines effective in federal courts on November 1, 1987. The complex system devised by the commission represents a dramatic shift away from a system premised on the offender's rehabilitative potential. Salient features of the guidelines include severely curtailed judicial discretion, appeal by either the state or the defendant when the judge imposes a sentence outside of the guidelines, and restrictions on sentencing alternatives. See Sears, Sentencing Guidelines — Shifting Discretion From the Judge to the Prosecutor?, 17 The Colorado Lawyer 1 (Jan. 1988).

\(^{66}\) Figures were compiled by the author from those cases reported in the Montana State Reporter and from records held by the Montana Defender Project.

\(^{67}\) Id.

\(^{68}\) Id.
cases, or a little over 1 percent of the total, were increased. 69

Of course, these figures do not represent the total number of
offenders sent to prison in this period who were eligible for sen-
tence review. For example, during the five-year period between
1978 through 1982, 1,667 inmates were admitted to the Montana
State Prison. 70 Of these, 563 filed applications with the sentence
review division. 71 However, only 337 inmates actually followed
through on their applications and completed the review process
before the review division. 72 During this same five-year period, the
review division modified 148 cases: 143 altered in favor of the peti-
tioner and the remaining five increased. 73 Therefore, of the original
1,667 inmates admitted to the Montana State Prison during this
period, the sentence review division overruled the district courts’
discretion in approximately 9 percent of the cases.

The following table 74 shows a breakdown of the major catego-
ries of offenses reviewed with the resulting sentence modifications.
Even a cursory inspection demonstrates considerable variations in
the frequency of sentence modifications between different types of
crimes. The data clearly suggest that despite the review division’s
concern with achieving sentence uniformity, other factors play a
significant role in the review division’s determinations.

69. Id.
70. See Hearing on S.B. 150, supra note 7, at Exhibit I.
71. Id.
72. Id.
73. Id.
74. In those cases where the petitioner was convicted of multiple offenses and it was
not possible from the record to determine which offense the review division addressed when
modifying the sentence, the modification will appear under both categories of offense.
### TABLE I

<table>
<thead>
<tr>
<th>Crime Type</th>
<th>Cases Heard</th>
<th>Sentences Decreased</th>
<th>Sentences Increased</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Percent</td>
<td>Number</td>
<td>Percent</td>
</tr>
<tr>
<td><strong>Cases</strong></td>
<td><strong>Sentences</strong></td>
<td><strong>Percent</strong></td>
<td><strong>Number</strong></td>
</tr>
<tr>
<td><strong>Crimes Against Persons</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Homicide</td>
<td>148</td>
<td>21.6 %</td>
<td>32</td>
</tr>
<tr>
<td>Assault</td>
<td>127</td>
<td>22.0 %</td>
<td>28</td>
</tr>
<tr>
<td>Kidnap</td>
<td>30</td>
<td>20.0 %</td>
<td>6</td>
</tr>
<tr>
<td>Sex-related crimes</td>
<td>130</td>
<td>20.7 %</td>
<td>27</td>
</tr>
<tr>
<td><strong>Crimes Against Property</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robbery</td>
<td>145</td>
<td>30.3 %</td>
<td>44</td>
</tr>
<tr>
<td>Burglary</td>
<td>277</td>
<td>29.6 %</td>
<td>82</td>
</tr>
<tr>
<td>Bad checks/Forgery</td>
<td>121</td>
<td>34.7 %</td>
<td>42</td>
</tr>
<tr>
<td>Theft</td>
<td>160</td>
<td>36.8 %</td>
<td>59</td>
</tr>
<tr>
<td>Criminal Mischief</td>
<td>21</td>
<td>66.6 %</td>
<td>14</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drug-related crimes</td>
<td>99</td>
<td>38.3 %</td>
<td>38</td>
</tr>
</tbody>
</table>

For example, the table indicates a reluctance by the review division to disturb the trial court's discretion when the crime is of a violent nature. In approximately 80 percent of the cases heard by the review division, involving either actual injury or the high potential of injury to the victim, the trial court's decision has been upheld. Moreover, the figures suggest the review division effectively limited sentence increases to those offenses resulting in physical injury or death to the victim. A similarity in the frequency of modification found in crimes against persons can be seen in crimes involving robbery and burglary. As with crimes against persons, a substantial majority of these offenses have been affirmed, once again suggesting that the high potential of injury or death to victims associated with these crimes influenced the review division's decision.

Additionally, there exists within this category of violent crimes a correlation between the degree of physical injury and the frequency of sentence modification. For example, of the thirty-six petitioners whose offenses consisted of deliberate homicide, six received favorable modifications. In two of these six cases, however,

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the review division had no choice but to modify or remand the sentence, since the trial court's decision was clearly illegal.\textsuperscript{76} In two other cases, the review division modified the sentences, at least in part, due to the trial court's failure to provide reasons substantiating the petitioner's sentence.\textsuperscript{77} Therefore, the review division reduced a petitioner's sentence based exclusively on equitable considerations in only two cases, or 5.5 percent of the deliberate homicide cases reviewed.\textsuperscript{78}

By contrast, the review division has more favorably received petitioners' arguments to reduce sentences for crimes against persons where the victim suffered a lesser degree of injury. For example, in the area of crimes involving assault, the review division reduced the petitioner's sentence, based exclusively on equitable considerations or to redress sentence disparity, in 15.6 percent of the cases modified.\textsuperscript{79}

If the review division has demonstrated reluctance to modify sentences for crimes against persons, particularly in cases involving serious injury or death to the victim, the same cannot be said of crimes committed exclusively against property. Regarding this latter offense, the review division seems more receptive to arguments based on equity, or the need to achieve sentence uniformity, over-turning the trial judges' discretion in between 34 and 66 percent of the cases reviewed.\textsuperscript{80} Significantly, in no instance has the petitioner suffered a sentence increase for this type of offense.

A. Reductions

Analysis of sentence modifications is limited by the frequent failure of the review division to articulate the reasoning underlying its decisions or to relate modifications to sentencing objectives. In more than half of the reductions made, the review division either failed entirely to provide explanations or produced statements offering very limited guidance to the reasoning behind its decisions.\textsuperscript{81}

\textsuperscript{76.} Stewart, ___ Mont. (Sent. Rev. Div.) ___, No. 3875, slip op.; Schirmer, 182 Mont. (Sent. Rev. Div.) at 3.

\textsuperscript{77.} McGuinn, 198 Mont. (Sent. Rev. Div.) at 11; Simonton, 198 Mont. (Sent. Rev. Div.) at 16.

\textsuperscript{78.} Gollehon, ___ Mont. (Sent. Rev. Div.) ___, Metcalf, ___ Mont. (Sent. Rev. Div.) ___.

\textsuperscript{79.} In three of the 19 cases reduced involving assault the review division noted the trial court's failure to provide reasons for the initial sentence imposed as a determining factor in its decision. See, e.g., State v. McCoy, 198 Mont. (Sent. Rev. Div.) 11 (1982); State v. Klemann, 197 Mont. (Sent. Rev. Div.) 7 (1982); and State v. Howard, ___ Mont. (Sent. Rev. Div.) ___, No. DC-79-283, slip op. (Sent. Rev. Div. Dec. 22, 1980).

\textsuperscript{80.} See supra Table I.

\textsuperscript{81.} E.g., State v. Scott, ___ Mont. (Sent. Rev. Div.) ___, No. 4911 slip op. (Sent.
Nonetheless, certain guidelines can be discerned from among those cases containing reasoned opinions.

Most striking, in the great majority of sentences reduced, the petitioner’s “individual characteristics, circumstance, needs and potentialities,” rather than the need to achieve strict sentence uniformity, seemingly affected the review division. In only twenty-seven cases, or approximately 6 percent of the total cases reduced, has the written opinion contained any discussion suggesting that the decision was made to achieve uniformity with the average sentence imposed for that crime. In at least five other cases the review division noted an even more glaring lack of uniformity, that of disparity between co-defendants, which played a part in its decision to reduce the sentence.

Far more frequently, the review division cited factors pertaining to the petitioner’s personal background in its decision to reduce the sentence. For example, the petitioner’s lack of prior criminal convictions was a factor in the reduction of at least forty cases ranging in severity from forgery and criminal mischief to kidnap and deliberate homicide. In thirty-six reductions the review division noted the petitioner’s age as a primary factor in its decision to modify the sentence. Although the factors of age and prior record are primarily eq-

uitable considerations, their frequent citation suggests the review division considers these factors when attempting to achieve overall sentence uniformity between offenders of similar age and background. However, the review division has also shown itself receptive to equitable arguments having little relation to sentence uniformity. For example, in State v. Coe, the petitioner, a vagrant, received a sentence of fifteen years for a conviction of robbery and three years for a conviction of theft, to run concurrently with other charges, and five years for use of a weapon to run consecutively with the other charges. The review division affirmed the district judge’s sentence regarding the use of a dangerous weapon, but reduced the petitioner’s sentence for robbery to ten years. In its opinion, the review division stated that the modification was “to remove any question whether the defendant was being punished by the sentencing judge for her life style or status in society...”

The petitioner in State v. Leguin, pursuant to a plea bargain, pleaded guilty to the offense of committing sexual assault against a minor. The sentencing judge rejected the two year suspended sentence recommended in the plea bargain, imposing instead a ten year sentence. The review division amended the sentence to ten years with five years suspended, noting the petitioner spared the victim the ordeal of trial by admitting guilt despite the state’s very weak case. Other equitable considerations recognized by the review division when reducing sentences include the petitioner’s lack of education, poor health, family responsibility, poor economic background, and military record.

In compliance with Rule 16 of the Rules of the Sentence Review Division, the review division also gave serious consideration to the question of rehabilitation, noting this factor in at least twenty-three sentence reductions. Cases where rehabilitation was cited as a factor in the decision to reduce the sentence can be divided into two categories: those in which the review division noted the petitioner’s high potential for rehabilitation and those in which

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92. __ Id.__
the sentence was reduced to give the petitioner some incentive to rehabilitate. Typical of the former category of cases is *State v. Davis*,\(^\text{100}\) where the petitioner received a ten year sentence with seven years suspended for the offense of issuing bad checks. In its opinion reducing the sentence to five years with two suspended, the review division noted the petitioner's age (eighteen at the time the offense was committed), the non-violent nature of the crime and the petitioner's "good prospect[s] for rehabilitation."\(^\text{101}\) Sentence reductions made to provide incentive for rehabilitation generally involve serious offenders who have received lengthy terms of incarceration. In *State v. Olsen*,\(^\text{102}\) the petitioner received a ten year sentence without possibility of parole or furlough for the offense of burglary. The review division noted that in light of the petitioner's prior criminal record, the trial court rendered the initial sentence "with discretion and statutory propriety."\(^\text{103}\) Nonetheless, "as an incentive to future rehabilitation,"\(^\text{104}\) the review division modified the petitioner's sentence, making him eligible for parole once he served one-half of his sentence.

In a relatively high proportion of cases, the review division modified the sentence not to achieve uniformity or equity, but because of some failure on the part of the district court. In at least twelve cases, the review division either reduced or remanded the case to the district court for resentencing because the original sentence was clearly illegal.\(^\text{105}\) In fifteen other cases, the sentence was reduced specifically because of the trial court's failure to provide reasons for the high sentences imposed. For example, in *State v. Klemann*,\(^\text{106}\) the review division reduced the petitioner's twelve year sentence for assault to eight years. In reaching this decision the review division accepted the defense counsel's facts as true and correct, noting the district judge's failure to provide reasons for the sentence, the county attorney's failure to make an appearance and present the state's case, and the lack of information in the court record.

Finally, in a number of early cases the review division altered the petitioner's sentence, at least in part, for reasons more properly

106. 197 Mont. (Sent. Rev. Div.) 7 (1982).
within the jurisdiction of the parole board than of the sentence review division. In at least six cases, the petitioners’ good prison conduct moved the review division\(^{107}\), while in two others the petitioners’ recent offers of employment\(^{108}\) were cited as instrumental in the decision to reduce the sentence.

### B. Increases

In theory at least, the review division’s power to increase, as well as decrease, sentences should contribute to the goal of achieving sentence uniformity. In practice, however, the extremely limited number of increases has only a minimal impact on overall sentence disparity. The fact that the review division exercises the power to increase sentences so infrequently does not necessarily point to any defect in the review process. As anticipated by the architects of our review statutes, since only the defendant enjoys the right to apply for review, the review division faces “clearly inadequate” sentences only in those rare instances where a misguided defendant insists on the review of a lenient sentence.

In fact, the power to increase sentences plays an important, if more pragmatic, role in the review process. The threat of sentence increase acts as a significant deterrent to those defendants who would otherwise flood the review division with frivolous appeals.\(^ {109}\) Although the sample of cases involving sentence increase is small, certain policies can be discerned. As indicated by Table I, the review division limits the exercise of its power to increase sentences almost exclusively to serious crimes, usually those involving physical injury or death to the victim.

Even in cases where the victim did not suffer actual physical injury or death, the potential of such injury, combined with other factors, proved sufficient to persuade the review division to increase the sentence. For example, in State v. Sweet,\(^ {110}\) the peti-

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tioner was sentenced to a prison term of ten years with five suspended for conspiring to murder her husband with a bomb. In an exceptionally detailed opinion justifying its decision to revoke the suspended portion of the sentence, the review division noted the reprehensible nature of the crime, the petitioner's lack of remorse, petitioner's original conviction of conspiring to commit homicide, as well as the deterrent effect of the longer sentence on others contemplating such an act.

In at least two cases, the review division communicated its desire to achieve sentence uniformity when increasing the petitioner's sentence. After concluding in *State v. Camitsch*111 that the applicant's designation as "dangerous" was contrary to statute, the review division increased the applicant's sentence for sexual assault from forty years with twenty suspended to forty years with fifteen suspended. The review division declared that the increase brought the sentence in line with similar sentences. In *State v. Campbell*,112 the applicant was sentenced to six years for negligent homicide stemming from a driving accident. The review division increased the prison term to eight years, proclaiming the longer sentence "more consistent with other sentences for habitual traffic offenders whose actions eventually result in a death."113

While considerations of extreme violence and sentence uniformity played major roles in sentence increases, other factors have been cited in the opinions. In *State v. Henrich*,114 the district court sentenced the defendant to two years of incarceration with one year suspended for manslaughter. The review division justified the substantial increase of the sentence to five years as an opportunity to afford the defendant more intensive care and treatment. In *State v. Holman*,115 the applicant received a forty year sentence for robbery and a twenty year sentence for assault, both prison terms to run concurrently. The review division increased the sentence by running the prison terms consecutively, while suspending ten years from the robbery charge. Reasons behind the ten year increase included the applicant's extensive prior felony and juvenile record, the premeditated nature of the crime, the co-defendant's higher sentence, and the horrendous injuries suffered by the victim.

111. 197 Mont. (Sent. Rev. Div.) 3-4 (1982).
113. *Id.*
VI. Conclusion

The Montana Review Division has been the subject of considerable controversy and criticism since its creation. However, many of the objections to our present system stem from a misunderstanding of how our review process functions and what it attempts to achieve. The primary objective of our review process is to ensure justice for the offender against the vagaries of judicial discretion. The benefits of this policy are threefold. First, on a practical level, by providing a forum where the convicted can appeal a sentence which he perceives unjust, the review division serves to prevent recidivism of convicts who pass through our legal system feeling wronged. Additionally, it helps alleviate inmate discontent which can lead to prison unrest. By its very existence, the review division achieves these objectives simply by providing a speedy and efficient outlet for inmate grievances.116

Second, and more importantly, the review division helps redress sentence disparities which undermine the integrity of our entire criminal system. This is not to suggest that the review division should or does strive to achieve absolute equality for similar crimes. As the preceding analysis indicates, the review division places at least as much weight on equitable factors, such as the petitioner's background or the circumstances surrounding the crime as the need to achieve uniformity between similar crimes. The review division has demonstrated, however, that if the trial judge wishes to impose a sentence significantly greater than the average sentence imposed for that crime, he or she must provide a detailed opinion justifying the same. This provides both the convicted and the review division with a written record explaining the sentence imposed, and it compels the trial judge to reflect more carefully before resorting to heavy sanctions.117

Finally, the review division plays a role in developing standards and guidelines for the district court to follow. The actual impact of the review division on district court decisions is beyond the scope of this study. Certainly, however, this policy-making role would be greatly enhanced if the review division consistently provided more detailed opinions indicating the reasons for its decisions and relating those reasons to sentencing objections.

116. See supra notes 59-60 and accompanying text.
117. "The duty to give an account of the decision is to promote thought by the decider, to compel him to cover the relevant points, to help him eschew irrelevancies — and, finally to make him show that these necessities have been served." M. Frankel, Criminal Sentencing 40 (1973).